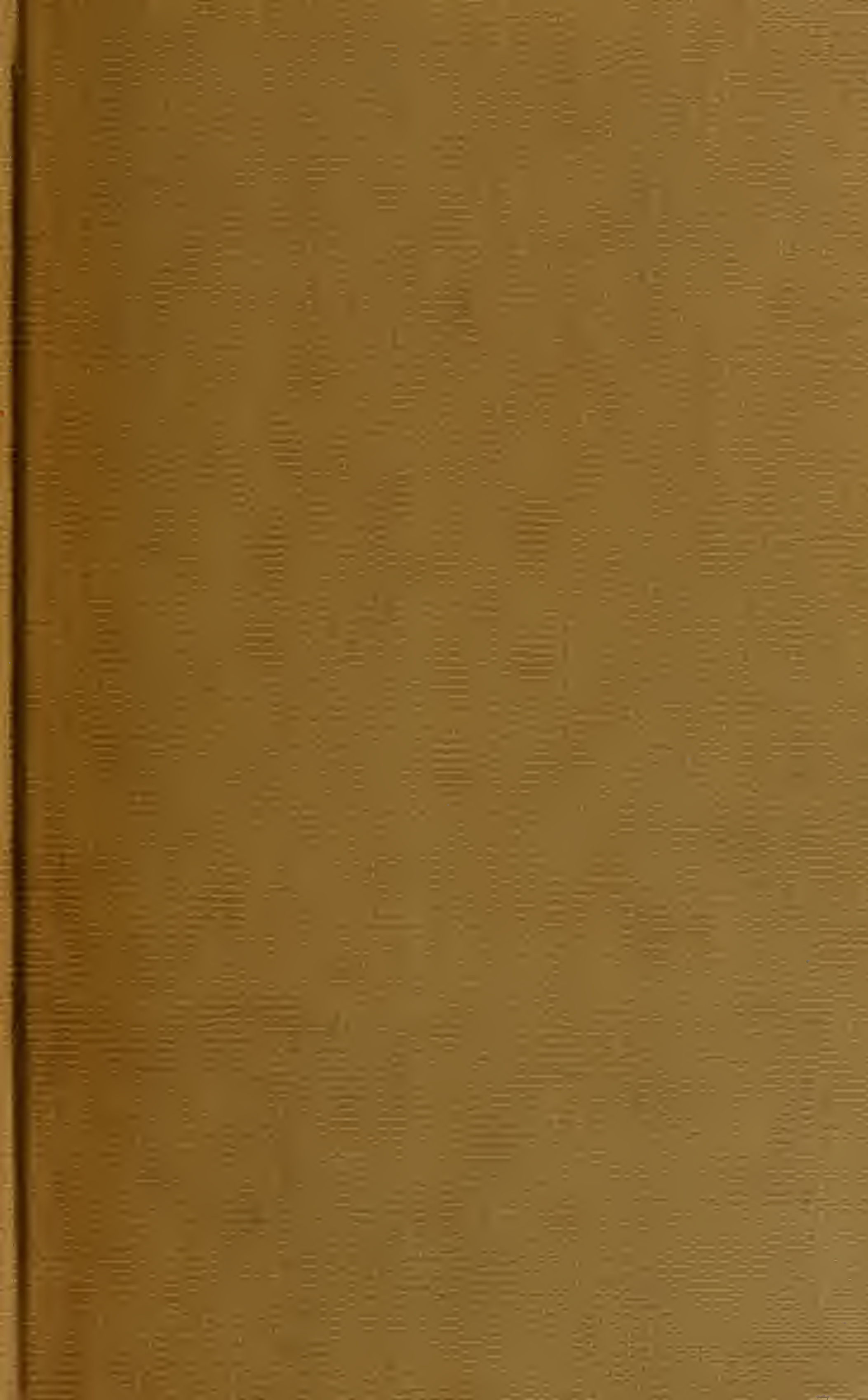

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3068

No. 15932

United States Court of Appeals
for the Ninth Circuit

C. H. ELLE CONSTRUCTION CO., a corporation and ST. PAUL-MERCURY INDEMNITY CO., a corporation, Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Eastern Division

FILED
MAY - 2 1958
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—4-17-58

No. 15932

United States Court of Appeals

for the Ninth Circuit

C. H. ELLE CONSTRUCTION CO., a corporation and ST. PAUL-MERCURY INDEMNITY CO., a corporation, Appellants,

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NAMES AND ADDRESSES OF ATTORNEYS

MERRILL & MERRILL,
Pocatello, Idaho,

Attorneys for Appellants.

O. R. BAUM,
BEN PETERSON,
RUBY Y. BROWN,

Box 570, Pocatello, Idaho,

Attorneys for Appellee.

In The United States District Court for the District of Idaho, Eastern Division

No. 1916

C. H. ELLE CONSTRUCTION CO., a corporation, Plaintiffs,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation, Defendant.

COMPLAINT

Comes now the plaintiff, C. H. Elle Construction Co., a corporation, and for cause of action against the defendant, complains and alleges:

I.

That the plaintiff C. H. Elle Construction Co., is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and is engaged in the general construction business with its principal place of business at Pocatello, Bannock County, Idaho.

II.

That the defendant, Western Casualty and Surety Company, is a foreign corporation organized and existing under the laws of the State of Kansas, and is duly qualified, licensed and authorized to do business in the State of Idaho as an insurance company, writing automobile liability coverage.

III.

That the plaintiff is a citizen of Idaho and the defendant is a citizen of the State of Kansas; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

IV.

That the defendant has heretofore issued a policy of automobile liability insurance to one William S. Gagon, insuring a certain two-ton truck owned by the said William S. Gagon against property damage and public liability for personal injury.

V.

That on or about the 22nd day of August, 1954, the above-mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley; that the said M. Burke Horsely was at said time an employee of the plaintiff and was engaged in the scope of his employment with said plaintiff; that on said day there occurred a collision between said vehicle and an automobile driven by one Arnold Campbell as a result of which, on the 28th day of February, 1955, an action was filed in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock by Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors by their guardian ad litem, Mary Lou Campbell, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larson, and W. S. Gagon,

praying for money damages for the alleged death of Arnold Campbell, and further praying for property damage to the vehicle of Arnold Campbell.

VI.

That the above-described policy of insurance issued by Western Casualty and Surety Company included what is commonly known as an "omnibus clause" by the terms of which any person using the automobile of the named insured with the permission of said named insured is included within the coverage of the policy in the same manner as if he were the named insured; that said policy further provides that the insurer will defend any suit against the insured, will provide legal defense and costs thereof, and will pay on behalf of the insured all sums which the said insured shall become legally obligated to pay as damages because of bodily injury or injury to all destruction of property arising out of the use of the said automobile, and any person or organization legally responsible for the use of the automobile.

VII.

That under provisions of said policy the said plaintiff herein by and through its agents and servant, M. Burke Horsley, became an additional insured under the policy issued by the defendant.

VIII.

That demand has been made by this plaintiff upon the said defendant to assume the defense and

costs and other obligations pursuant to its contract and growing out of the above-described legal action, but said defendant has refused and still refuses, so to do.

IX.

That there is a controversy existing between the plaintiff and the defendant by reason of the aforesaid claim and by reason of the defendant's refusal to assume liability and obligations under its said insurance contract.

X.

That the plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. That this Court adjudicate, declare and determine that the said defendant, by virtue of the above-described insurance policy, be required to provide public liability and property damage protection according to the said policy and be required to assume the costs of defense and the primary defense of the action entitled "In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, Mary Lou Campbell, and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, Plaintiffs, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, Defendants."

2. That the plaintiff have such other and further

relief as to this Court may seem meet and equitable, including its costs incurred herein.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for the Plaintiff.

[Endorsed] Filed Sept. 19, 1955.

[Title of District Court and Cause.]

SUMMONS

To The Above Named Defendant:

You are hereby summoned and required to serve upon Merrill and Merrill, plaintiff's attorneys whose address is Pocatello, Idaho, answer to the Complaint which is herewith served upon you within 20 (twenty) days after service of this Summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

[Seal] /s/ By ED M. BRYAN,
Clerk of the Court.

Return On Service of Writ

United States of America,
District of Idaho—ss.

I hereby certify and return that I served the annexed Summons & Complaint on the therein-named Western Casualty and Surety Company, a corporation, by handing to and leaving a true and correct

copy thereof with Leo O'Connell, Commissioner of Insurance for the State of Idaho, personally at State Capitol Bldg. at Boise, Idaho, in the said District at 2:30 p.m., on the 22nd day of September, 1955.

Marshal's fees	$2.00
Mileage	None
Total	$2.00

SAUL H. CLARK,
United States Marshal,
/s/ By REX WALTERS,
Deputy.

[Endorsed]: Filed Sept. 24, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant herein moves the Court to dismiss the above entitled action for one, or more, or all, of the following reasons:

1. To dismiss the action on the ground that the Court lacks jurisdiction because the amount involved herein is a matter wherein the controversy does not now exceed, exclusive of interest and costs, the sum of $3,000.00.

2. That the Court lacks jurisdiction over the subject matter herein for the reason that the subject matter is a matter between two individuals,

and that the controversy cannot exceed the sum of $3,000.00, exclusive of interest and costs.

3. That the action was brought in the wrong District because:

(a) The jurisdiction of this Court is involved solely on the ground that the action arises under the Constitution and the laws of the United States, and the defendant is a corporation incorporated under the laws of the State of Kansas and is an inhabitant thereof, and qualified within the State of Idaho, and the jurisdiction is that of the Southern Division of the District of Idaho.

4. To dismiss the action, or in lieu thereof, to quash the return of summons on the ground that the defendant is a corporation organized under the laws of Kansas and was not, and is not, subject to service of process within the Eastern Division of the District of Idaho, United States of America.

5. To dismiss the action because the complaint fails to state a claim against the defendant upon which relief can be granted.

Dated this 10th day of October, 1955.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed October 12, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

Oct. 18, 1955

This cause came on regularly this date in open court for hearing on defendant's Motion to Dismiss, Wesley Merrill appearing for the plaintiff and O. R. Baum and Isaac McDougal appearing as counsel for the defendant.

After a discussion by counsel for the respective parties, it was ordered that the Motion to Dismiss be sustained and that plaintiff have five days to amend its Complaint.

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the plaintiff, C. H. Elle Construction Co., a corporation, by way of an Amended Complaint, and for cause of action against the defendant, complains and alleges:

I.

That the plaintiff, C. H. Elle Construction Co., is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and is engaged in the general construction business with its principal place of business at Pocatello, Bannock County, Idaho.

II.

That the defendant, Western Casualty and Surety

Company, is a foreign corporation organized and existing under the laws of the State of Kansas, and is duly qualified, licensed and authorized to do business in the State of Idaho as an insurance company writing automobile liability coverage.

III.

That the plaintiff is a citizen of Idaho and the defendant is a citizen of the State of Kansas; that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

IV.

That the defendant has heretofore issued a policy of automobile liability insurance to one William S. Gagon, insuring a certain two-ton Truck owned by the said William S. Gagon against property damage and public liability for personal injury, that said policy, Plaintiff is informed and believes, and therefore alleges the facts to be, insured the said William S. Gagon against property damage in the amount not to exceed $1,000.00 and for public liability for personal injury not to exceed $5,000.00 for injury to one person.

V.

That on or about the 22nd day of August, 1954, the above-mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley; that the said M. Burke Horsley was at said time an employee of the plaintiff and was engaged in the scope of his employment with said

plaintiff; that on said day there occurred a collision between said vehicle and an automobile driven by one Arnold Campbell as a result of which, on the 28th day of February, 1955, an action was filed in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock by Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors by their guardian ad litem, Mary Lou Campbell, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larson, and W. S. Gagon, praying for money damages for the alleged death of Arnold Campbell, in the amount of $100,000.00 and further praying for property damage to the vehicle of Arnold Campbell in the amount of $1,-620.00.

VI.

That the above described insurance policy issued by Western Casualty and Surety Company, included what is normally known as an "omnibus clause." By the terms of which the word "insured" includes the named insured and also includes any person while using the vehicle and any person or organization legally responsible for the use thereof, providing the actual use of the vehicle is with the permission of the said insured; that any person or organization legally responsible for the use of said vehicle when the actual use is with the permission of the named insured is thereupon included in the coverage under the policy in the same manner as if named therein; that said policy further provides that the insurer or defendant, in the

event there is any suit against the insured, or those noted above, will provide legal defense or costs thereof and will pay on the behalf of the insured or any person or organization legally responsible for the use of the vehicle, all sums which said insured is legally obligated to pay as damages because of property injury or injury to a person arising out of the use of said vehicle by said named insured or any person or organization legally responsible for the use of the vehicle.

VII.

That under provisions of said policy the said plaintiff herein by and through its agents and servant, M. Burke Horsley, became an additional insured under the policy issued by the defendant.

VIII.

That demand has been made by this plaintiff upon the said defendant to assume the defense and costs and other obligations pursuant to its contract and growing out of the above described legal action, but said defendant has refused and still refuses, so to do.

IX.

That there is a controversy existing between the plaintiff and the defendant by reason of the aforesaid claim and by reason of the defendant's refusal to assume liability and obligations under its said insurance contract.

X.

That the plaintiff has no plain, speedy or adequate remedy at law.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. That this court adjudicate, declare and determine that the said defendant, by virtue of the above-described insurance policy, be required to provide public liability and property damage protection according to the said policy and be required to assume the costs of defense and the primary defense of the action entitled "In the District Court of the Fifth Judicial District of the State of Idaho, In and for the County of Bannock, Mary Lou Campbell, and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, Plaintiffs, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, Defendants."

2. That the plaintiff have such other and further relief as to this court may seem meet and equitable, including its costs incurred herein.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for the Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed October 21, 1955.

[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT

Comes now the plaintiff, C. H. Elle Construction Company, a corporation, and moves the Court for an Order permitting the plaintiff to file its Amended and Supplemental Complaint, for the reasons and upon the grounds set forth in said amended and Supplemental Complaint, a copy of which is attached hereto as Exhibit "A" and made a part hereof, and upon the grounds set forth in the Affidavit attached hereto as Exhibit "B".

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys For Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

AFFIDAVIT FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT

State of Idaho,
County of Bannock—ss.

Wesley F. Merrill, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiffs in the above entitled action, and makes this Affi-

davit in support of the Motion for Leave to File Amended and Supplemental Complaint, filed concurrently herewith:

That since the filing of the original Complaint and Amended Complaint herein, the legal action filed in the District Court of the Fifth Judicial District of Idaho, in and for the County of Bannock, which said action is described in the said Complaints, has been tried before a jury and a judgment entered in favor of the plaintiffs; that said judgment in the District Court of the State of Idaho was rendered December 23, 1955, with a judgment for costs therein rendered May 29, 1956; that it becomes necessary, therefore, for plaintiff to file and serve an Amended and Supplemental Complaint to set forth the facts which have occurred since the Amended Complaint was filed, and set forth the complete and accurate damages suffered by said plaintiff;

That said facts have occurred since the former Amended Complaint herein was made and filed.

/s/ WESLEY F. MERRILL.

Subscribed and sworn to before me this 6th day of June, 1956.

[Seal] /s/ J. R. MOONEY, Jr.,

Notary Public for Idaho Residing at Pocatello, Idaho.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL COMPLAINT

Comes now the plaintiffs, C. H. Elle Construction Company, a corporation, and St. Paul-Mercury Indemnity Company, a corporation, leave having been granted by the Court, and by way of an Amended and Supplemental Complaint allege:

I.

That the plaintiff, C. H. Elle Construction Co., is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho and is engaged in the general construction business with its principal place of business at Pocatello, Bannock County, Idaho.

II.

That the plaintiff, St. Paul-Mercury Indemnity Company, a corporation, is a foreign company organized and existing under the laws of the State of Minnesota, and is duly qualified, licensed and authorized to do business in the State of Idaho as an insurance company writing casualty and liability insurance coverage.

III.

That the defendant, Western Casualty and Surety Company, is a foreign corporation organized and existing under the laws of the State of Kansas, and is duly qualified, licensed and authorized to do business in the State of Idaho as an in-

surance company writing automobile liability coverage.

IV.

That the plaintiff, C. H. Elle Construction Company, a corporation, is a citizen of the State of Idaho, and the plaintiff, St. Paul-Mercury Indemnity Company, a corporation, is a citizen of the State of Minnesota; that the defendant is a citizen of the State of Kansas; that the matters in controversy exceed, exclusive of interest and costs, the sum of $3,000.00.

V.

That the said St. Paul-Mercury Indemnity Company has heretofore issued a policy of insurance, designated as a multiple coverage policy, insuring C. H. Elle Construction Company against loss from all such sums as the said C. H. Elle Construction Co. shall become obligated to pay by reason of liability imposed by law for bodily injury liability and automobile property damage, providing, however, that said insurance shall be excess beyond the amount payable under any other policy or policies affording insurance protection in any way to the said C. H. Elle Construction Company.

VI.

That the defendant has heretofore issued a policy of automobile liability insurance to one William S. Gagon, insuring a certain 1954 Chevrolet two-ton Truck owned by the said William S. Gagon against property damage and public liability for personal injury, that said policy, plaintiffs are informed and

believe, and therefore allege the facts to be, insured the said William S. Gagon against property damage in the amount not to exceed $10,000.00 and for public liability for personal injury not to exceed $10,000.00 for injury to one person.

VII.

That on or about the 22nd day of August, 1954, the above-mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley; that the said M. Burke Horsley was at said time an employee of the plaintiff C. H. Elle Construction Co. and was engaged in the scope of his employment with the said C. H. Elle Construction Co.; that on said day there occurred a collision between said vehicle and an automobile driven by one Arnold Campbell, as a result of which, on the 28th day of February, 1955, an action was filed in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock by Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors, by their guardian ad litem, Mary Lou Campbell, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larson, and W. S. Gagon, praying for money damages for the alleged death of Arnold Campbell, in the amount of $100,000.00 and further praying for property damage to the vehicle of Arnold Campbell in the amount of $1,620.00.

VIII.

That the above described insurance policy issued by Western Casualty and Surety Company included what is normally known as an "omnibus clause," by the terms of which the word 'insured':

> "includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, providing the actual use of the automobile is by the named insured or with his permission;"

that any person or organization legally responsible for the use of said vehicle when the actual use is with the permission of the named insured is thereupon included in the coverage under the policy in the same manner as if named therein; that said policy further provides that the insurer or defendant, in the event there is any suit against the insured, or those noted above, will provide legal defense or costs thereof and will pay on the behalf of the insured or any person or organization legally responsible for the use of the vehicle, all sums which said insured is legally obligated to pay as damages because of property injury or injury to a person arising out of the use of said vehicle by said named insured or any person or organization legally responsible for the use of the vehicle.

IX.

That under provisions of said policy, the said plaintiff, C. H. Elle Construction Co., by and

through its agents and servant, M. Burke Horsley, became an additional insured under the policy issued by the defendant.

X.

That demand has been made by plaintiffs upon the said defendant to assume the defense and costs and other obligations pursuant to its contract and growing out of the above described legal action, but said defendant has refused, and continued to refuse, so to do.

XI.

That since the filing of the original Complaint herein, and on December 23, 1955, judgment was entered in the above described cause in favor of the plaintiffs, Mary Lou Campbell, and Terrell Ray Campbell and Curtis Howard Campbell, minors, by their guardian ad litem, Mary Lou Campbell, and against C. H. Elle Construction Co., a corporation, and M. Burke Horsley, in the amount of $15,000.00, and a judgment for costs was entered the 29th day of May, 1956, in the amount of $371.40.

XII.

That said judgment in the total amount of $15,-371.40 has been paid, for and on behalf of C. H. Elle Construction Co., a corporation, by the plaintiff, St. Paul-Mercury Indemnity Co., a corporation; that the costs of legal defense of the said C. H. Elle Construction Co., a corporation, and M. Burke Horsley totalled a sum of $1,639.53, which has been paid by the plaintiff, St. Paul-Mercury

Indemnity Co., for and on behalf of the said C. H. Elle Construction Co.

XIII.

That the said plaintiffs herein have been damaged in the sum of $17,010.93, of which sum the defendant herein is obligated for the amount of $10,000.00 under the public liability portion of its policy, $1,620.00 under the property damage portion of its policy, and $1,639.53 as legal expenses and costs, making a total of $13,259.53.

Wherefore, plaintiffs pray judgment against defendant for $13,259.53, plus costs of suit incurred herein and such other and further relief as to this Court may seem meet and equitable in the premises.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

[Endorsed]: Filed June 13, 1956.

[Title of District Court and Cause.]

ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

Comes now the defendant, as and for its answer to the amended and supplemental complaint as filed by the plaintiffs herein, and alleges, affirms and denies as follows:

First Defense

The amended and supplemental complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

I.

Defendant admits the allegations of paragraphs I, II and III.

II.

Answering paragraph IV defendant admits all of the allegations therein contained, save and except the following: "that the matters in controversy exceed, exclusive of interest and costs, the sum of $3,000.00," and as to such allegations denies each and every allegation of such quoted portion.

III.

Answering paragraph V defendant denies each and every allegation in said paragraph contained and states that, while an insurance policy was issued, the same is not the type and kind as alleged by said plaintiffs.

IV.

Answering paragraph VI defendant admits that there was issued to William S. Gagon an insurance policy, but denies that the said policy is the type and kind as set out in said paragraph or that it is in the amounts as set out in said paragraph.

V.

Answering paragraph VII defendant denies each and every allegation in said paragraph contained, save and except the allegation in reference to the institution of an action by Mary Lou Campbell, and as to that allegation, admits such an action was filed.

VI.

Answering paragraph VIII defendant denies each and every allegation in said paragraph contained, and states the facts to be that the policy did not provide, and does not provide, protection for matters and things as maintained and as set out by the said plaintiffs, and further states that said plaintiffs are not in a position to take advantage of or be given consideration as to a contract between said defendant and the said William S. Gagon, and further states that the policy provides only for the holding of William S. Gagon free and harmless by virtue of any claim that has been reduced to judgment, where the said William S. Gagon is obligated to make payment, and that in the action referred to in the plaintiffs' complaint, the said William S. Gagon was exonerated and he has no obligation to any person or persons whomsoever by reason thereof; and by reason of the terms of said policy, the said defendant herein is not obligated to pay any sum or sums of money whatsoever.

VII.

Answering paragraphs IX and X of said amended and supplemental complaint, defendant denies each and every allegation in each of said paragraphs contained.

VIII.

Answering paragraph XI defendant states that in the action referred to in said paragraph a judgment was rendered against the defendants C. H.

Elle Construction Company and M. Burke Horsley in the amount of $15,000.00, but states it has no information as to the amount of costs allowed, and therefore denies that costs in the amount of $371.40, or any other sum or amount, were allowed, and further states in answer to such paragraph that in such action William S. Gagon was made a party defendant and that the cause was tried before a jury and the jury brought in a verdict in favor of William S. Gagon and against the plaintiffs, and in the same action the jury brought in a verdict in favor of Mary Lou Campbell et al. and against the defendant C. H. Elle Construction Company and the defendant M. Burke Horsley, a copy of the said judgment or order as entered by the District Judge after the return of said verdict is attached hereto and marked Exhibit "A" and made a part hereof as fully and completely as if copied herein at length; and thereafter a judgment for costs was entered herein, a copy of such judgment in favor of the defendant William S. Gagon is hereto attached and marked Exhibit "B" and made a part hereof as fully and completely as if copied herein at length; that by the terms of such judgment and as the result of such action the said William S. Gagon was exonerated and your said defendant herein is not obligated to pay any sum or sums of money whatsoever on behalf of the said William S. Gagon, and not until a judgment had been entered against the said William S. Gagon was there any obligation upon your said defendant to make payment of any sum or sums of money whatsoever.

IX.

Answering paragraph XII defendant states it has not sufficient information upon which to base an affirmation or denial of the same, and therefore denies each and every allegation in said paragraph contained.

X.

Answering paragraph XIII defendant denies that the plaintiffs have been damaged in the sum of $17,010.93, and likewise denies that the defendant herein is obligated to pay the sum of $10,000.00 or any other sum under the public liability portion of its policy, and likewise denies that is is obligated to pay $1620.00 or any other sum or any other amount under the property damage portion of its policy, and likewise states that it is under no obligation to pay $1,639.53, or any other sum or any other amount, as legal expenses, and likewise denies it is obligated to pay a total of $13,259.53 or any other sum or any other amount.

Third Defense

Defendant as and for its First Affirmative Defense, termed "Third Defense," alleges:

I.

That the said plaintiffs herein are now and at all times herein mentioned have been represented by the identical counsel that appears for said plaintiffs in this instant action, and that in the action referred to in paragraph VII of said amended and supplemental complaint the said identical counsel

appeared therein for the defendant C. H. Elle Construction Company, a corporation, M. Burke Horsley and Max Larsen, and that in such action the said defendants, C. H. Elle Construction Company, the said Max Larsen and the said M. Burke Horsley each filed separate answers, and that in such action so filed by Mary Lou Campbell as hereinbefore referred to, the said Mary Lou Campbell, in her Second Amended Complaint alleged among other things, as follows:

> "That at all times mentioned herein, defendant, William S. Gagon, was the owner of a 1954 Chevrolet truck, bearing 1954 Idaho License, 3C-1010; that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon."

and that said paragraph was numbered paragraph "IV" of said Second Amended Complaint, and to such paragraph IV, the plaintiffs herein, and each of them, answered the same as follows:

> "Answering paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a 1954 Chevrolet truck bearing 1954 Idaho license plates 3C-1010, but denies each and every other allegation contained in said paragraph."

thereby denying that the said truck in question was being driven "with the permission and consent of

the owner, William S. Gagon"; that the said pleadings in the said action referred to in paragraph VII of the amended and supplemental complaint herein are hereby made a part hereof by reference as fully and completely as if copied herein at length, and that the said action was tried upon the theory that no permission or consent had been given; that the said C. H. Elle Construction Company and the said M. Burke Horsley cooperated one with the other and went forward in said action under the pleadings herein set forth, and as the result of said trial the said William S. Gagon was exonerated, all as hereinbefore stated, and that in such action, so referred to in paragraph VII of the Amended and Supplemental Complaint herein, the said C. H. Elle Construction Company, one of the plaintiffs herein, and M. Burke Horsley admitted that M. Burke Horsley was an employee of the C. H. Elle Construction Company, and that at the time of the accident he was acting in the line, course and scope of his employment as an employee of the C. H. Elle Construction Company, and that the said action was defended at the specific direction, and under the order, of the said remaining plaintiff herein, the St. Paul-Mercury Indemnity Company, and that the said St. Paul-Mercury Indemnity Company, in each and every phase of said cause, employed the counsel that appeared for defendant C. H. Elle Construction Co., directed the course of such litigation by the same counsel that is counsel for the plaintiffs herein, and that at all times the said plaintiff, St. Paul-Mercury Indemnity Com-

pany, knew, or should have known, the theory upon which said cause was tried, and that the President of the C. H. Elle Construction Company, a corporation, knew, or should have known the theory upon which said cause was tried and the manner in which the cause went to trial and that the said C. H. Elle, an individual, being President of the said C. H. Elle Construction Company, was in and about the courtroom at said trial and at all times participated in said trial, and upon information and belief, defendant herein alleges that said action herein was instituted without the consent and without the knowledge of the said C. H. Elle Construction Company, and that in the instant action, in paragraph VII of said amended and supplemental complaint, the two plaintiffs herein allege, among other things, the following:

> "* * * the above mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley; * * *"

and that it is admitted in each of the pleadings that M. Burke Horsley was employed by the said C. H. Elle Construction Company and was acting in the line, course and scope of his employment at the time of the said accident, and that the plaintiffs herein, and each of them, are estopped from asserting herein the position that they have asserted, on account of the position or positions that each of them heretofore took in the course of the litigation referred to in the amended and supplemental com-

plaint and that the said action herein is an action so to speak upon the judgment that was rendered in said cause referred to in the said amended and supplemental complaint and it has reference to the same facts or state of facts, and that the pleadings of the plaintiffs herein, and each of them, are inconsistent with and contrary to the pleadings in the instant case, and also by the nature of the position that each of the said plaintiffs, or their officers and agents, took in such matter, the said plaintiffs, and each of them, cannot, at this time, in justice and in the cause of orderliness, regularity and expedition of litigation, be heard to say that they should recover in the instant action.

Fourth Defense

Defendant as and for its Second Affirmative Defense, termed "Fourth Defense," alleges:

I.

That in the said action referred to in said paragraph VII of the amended and supplemental complaint filed herein the said William S. Gagon was made a party by reason of the provisions of Section 49-1004, Idaho Code, and that in such action referred to in such paragraph, the same being filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, it was alleged as follows:

> "That at all times mentioned herein, defendant, William S. Gagon, was the owner of a 1954 Chevrolet Truck, bearing 1954 Idaho Li-

> cense, 3C-1010; that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon."

and that without such an allegation there was no cause of action stated against the said defendant William S. Gagon, and that the said William S. Gagon, in such action, denied such allegation, and that as a result of such trial so had, all as hereinbefore alleged, the said William S. Gagon was exonerated; that the provisions of Sec. 49-1004, Idaho Code, are as follows:

"Owner's tort liability for negligence of another. Subrogation.—1. Responsibility of owner for negligent operation by person using vehicle with permission—Imputation of negligence. Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

"2. Limitation of liability. The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of $5,000 for the death or injury to one person in any one accident and subject to said limit as to one person is limited to the amount of $10,000 with re-

spect to the death or injury to more than one person in any one accident and is limited to the sum of $1,000 for damage to property of others in any one accident.

"3. Operator to be made party defendant—Recourse to operator's property. In any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this state. Upon recovery of judgment, recourse shall first be had against the property of said operator so served.

"4. Subrogation of owner to rights of person injured—Recovery from operator—Bailee and driver deemed operators. In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner is subrogated to all the rights of the person injured and may recover from such operator the total amount of any judgment and costs recovered against such owner. If the bailee of an owner with the permission, expressed or implied, of the owner, permits another to operat*or* the motor vehicle of the owner, then such bailee and such driver shall both be deemed operators of the vehicle of the owner, within the meaning of subdivisions 3 and 4 of this section.

"5. Settlement and payment of claims where two or more are injured or killed in one accident—Diminution or extinguishment of owners liability.

Where two or more persons are injured or killed in one accident, the owner may settle or pay any bona fide claim or claims for damages answering out of personal injuries or death, whether reduced to a judgment or not, and such payments shall diminish to the extent thereof the owners total liability on account of such accident; and payments so made aggregating the full sum of $10,000 shall extinguish all liability of the owner hereunder to said claimants and all other persons on account of such accident; which liability may exist by reason of imputed negligence, pursuant to this section, and not arising through the negligence of the owner nor through the relationship of principal and agent nor master and servant.

"6. Vendee or assignee not deemed owner until possession retaken—Chattel mortgagee not deemed owner. If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed as owner within the provisions of this section, but the vendee or his assignee, shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section."

and that it is admitted in the pleadings in the action in the State Court, namely, the one referred to in Paragraph VII of the Amended and Supple-

mental Complaint, that the said M. Burke Horsley was the agent and employee of the said C. H. Elle Construction Company and was acting in the line, course and scope of his employment at the time of such accident, and that the said William S. Gagon had no liability in such matter and was not obligated to do anything in the matter except defend himself, all of which he did do, and was exonerated, and that if there had been judgment rendered against the said William S. Gagon by reason of having given consent and permission to drive said truck, then and in that event, he would have been subrogated to the rights of the person injured and could have recovered from said operator, and that the said operator was M. Burke Horsley, an agent and employee of the said C. H. Elle Construction Company; and in the event the said M. Burke Horsley failed to pay the said claim of the said William S. Gagon, then and in that event the said William S. Gagon, or his insurer, could have, and would have, proceeded against the said C. H. Elle Construction Company, and eventually against the St. Paul-Mercury Indemnity Company; and that in such action the said operator was made a party pursuant to the provisions of such section, and that if Idaho had not had the provisions of such section aforementioned, the said William S. Gagon would have been in nowise responsible and in nowise liable for any sum or sums of money whatsoever, and that said action was tried upon the theory that the said William S. Gagon's liability was limited to the sum of $5,000.00 for the death or injury to one person

in one accident and not in the sum of $10,000.00, or any other sum or any other amount, and likewise was tried upon the theory that the total amount of damages to the property was a sum not to exceed $1,000.00, and that the plaintiffs herein, and each of them, through their officers, agents and employees, all as hereinbefore stated, participated in said cause and took the position as shown by the pleadings in said original cause, and they should not at this time be permitted to say otherwise nor should they be permitted to take a contrary and other view of the matter than taken in the said original action, and that in no event, and under no theory of the said matter, could the said William S. Gagon have been responsible or liable for the injury of the said Arnold Campbell to exceed the sum of $5,000.00, and notwithstanding such facts, said plaintiffs herein seek to recover of and from the said defendant the sum of $10,000.00 on account of injury or death of the said Arnold Campbell, he being the deceased referred to in said original action; that the plaintiffs, and each of them, were aware of the position as taken by the plaintiffs in said original action so filed in the State Court, and the plaintiffs, and each of them, participated in the trial of the action which was instituted herein and the theory as adopted by the said William S. Gagon was consented to as being the correct position to be taken by the said William S. Gagon, and that under the statutes of the State of Idaho the said defendant is not responsible for any sum or sums of money whatsoever until the said owner of such

vehicle is proved to have given his permission and consent for the use of such vehicle so involved in such accident, and that a judgment has been rendered herein in favor of said William S. Gagon, and that by reason of said judgment which was entered as the result of said trial and by reason of the matters hereinbefore set forth, the said plaintiffs, and each of them, are estopped from asserting otherwise and should not be permitted to be heard further in said cause; that a copy of the files of the action of Mary Lou Campbell et al. vs. C. H. Elle Construction Co., et al., all as filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, is made part hereof by reference as fully and completely as if copied herein at length.

Fifth Defense

Defendant as and for its Third Affirmative Defense, termed "Fifth Defense," alleges:

I.

That the said defendant herein issued a policy of insurance to William S. Gagon, and that by the terms thereof, and pursuant to the provisions of the statutes of Idaho and the laws under which the said policy was issued, if the said William S. Gagon received a judgment against him, and if the same came within the terms of the policy and within the provisions of the statutes of the State of Idaho, then and in that event the said defendant herein would have been responsible to the party holding

such judgment; that is to say, your said defendant agreed to hold the said William S. Gagon free and harmless by reason of any judgment that may have been rendered; that there was no judgment rendered against the said William S. Gagon and that your said defendant is in nowise, and in no manner, obligated to the said plaintiffs, or either of them, in any sum or sums of money whatsoever, and that under the terms of said policy and under the statutes of the State of Idaho, as well as under the theory on which said action or actions was tried, and under no circumstances, no matter what the theory may have been, is the defendant obligated to pay any sum or sums of money whatsoever to the said plaintiffs.

Sixth Defense

Defendant as and for its Fourth Affirmative Defense, termed "Sixth Defense," alleges:

That your said defendant as a further defense to the said amended and supplemental complaint of the plaintiffs herein alleges on information and belief that the said C. H. Elle Construction Company has not as a matter of fact paid any sum or sums of money whatsoever, and that it is not now, nor has it ever been, a proper party plaintiff, and it is not now at this time entitled to go forward in such matter, as it has not obligated itself to pay any sum or sums of money whatsoever and that no funds have been expended by the said C. H. Elle Construction Company.

Seventh Defense

Defendant as and for its Fifth Affirmative Defense, termed "Seventh Defense," alleges:

That in the action referred to in paragraph VII of plaintiffs' amended and supplemental complaint the plaintiff herein, C. H. Elle Construction Company was before the court and that its defense was being directed and conducted by the said plaintiff, St. Paul-Mercury Indemnity Company, and that in truth and in fact the said St. Paul-Mercury Indemnity Company took over the complete handling and conducting of the defense of the C. H. Elle Construction Company, and that all of the parties to this action, or their privies in interest, were litigants and were parties to the action of Mary Lou Campbell et al. v. C. H. Elle Construction Company, et al., which action has been heretofore referred to, and in said action said parties, and each of them, had an opportunity to, and were in a position to, and had the right to, bring in additional parties, to wit, the said defendant herein, and to set forth any right, claim or interest that they may have had as against the said William S. Gagon and his insurer, the defendant herein, and that the said plaintiffs, and each of them, knew, long prior to the time of the action in the State Court, that the said William S. Gagon's defense was being directed for and on behalf of the said defendant herein, and that all matters and things between said parties were litigated, and that an opportunity was had by said plaintiffs to have the identical question herein sought to be litigated, litigated in the other action,

and that the said judgment as rendered in said cause so filed in said state court constitutes an estoppel by record, and likewise the said matters and things herein sought to be set forth have heretofore been litigated, or could have been litigated in the other action, and therefore and by reason of these facts, said plaintiffs are not now entitled to be heard in such matters or to by these proceedings go forward.

Wherefore, Defendant having fully answered said amended and supplemental complaint of the plaintiffs prays that it may be dismissed with its costs and all proper relief.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
Attorneys for Defendant.

EXHIBIT "A"

In the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock

MARY LOU CAMPBELL and TERRELL RAY CAMPBELL and CURTIS HOWARD CAMPBELL, Minors, by their Guardian Ad Litem, MARY LOU CAMPBELL,

Plaintiffs,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation, M. BURKE HORSLEY, MAX LARSEN, and W. S. GAGON, Defendants.

ORDER

This matter coming on for hearing before the Honorable Henry McQuade, District Judge, in open court sitting with a jury, and the plaintiffs, Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, being present in person and by their counsel, Gee & Hargraves, and the defendants, C. H. Elle Construction Co., a corporation, and M. Burke Horsley, being present by their counsel, Merrill & Merrill, and the defendant, W. S. Gagon, being present by his counsel, O. R. Baum and Ruby Y. Brown, and after the matter was given the jury the jury returned a verdict in favor of the defendant, W. S. Gagon, and against the plaintiffs, Mary Lou Campbell and Terrell Ray

Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell; and

It Is Therefore Ordered that the plaintiffs, Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, take nothing as to the defendant, W. S. Gagon, and the defendant, W. S. Gagon, is entitled to his costs in the sum of $..........

Dated this 28th day of December, 1955.

HENRY McQUADE,
District Judge.

Exhibit "B"

[Title of District Court and Cause.]

JUDGMENT AS TO COST ON BEHALF OF DEFENDANT W. S. GAGON

It appearing to the Court that heretofore a verdict in favor of the defendant W. S. Gagon and against the plaintiffs, Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, having been rendered, and thereafter a Cost Bill having been filed, and the plaintiffs having moved to re-tax costs, and after presentation, the matter was taken under advisement by the Court, and the Court having heretofore entered a Memorandum Decision,

Now, Therefore, in accordance with such Memorandum Decision,

It Is Ordered, Adjudged and Decreed that the defendant W. S. Gagon have costs allowed in the sum of $90.00, such sum being made up of costs as follows:

Witness Dr. Allan Tigert	$24.00
Witness Melba Personette	$24.00
Witness Elsie Woodall	$21.00
Witness Art Kelly	$21.00

and such amounts totaling $90.00 as above stated.

It Is Further Ordered that judgment in favor of W. S. Gagon and against the said plaintiffs for such amount is hereby ordered.

Let Execution Issue.

Dated this 24th day of May, 1956.

HENRY McQUADE,
District Judge.

[Endorsed]: Filed June 26, 1956. Sarah Devaney, Clerk Auditor and Recorder.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant and moves the Court to dismiss the above entitled action for the reason that the said Amended and Supplemental Complaint fails to state a claim against the defendant herein.

Dated this 5th day of July, 1956.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant and moves the Court to dismiss the plaintiff C. H. Elle Construction Co., a corporation, from said cause, for the reason that the Amended and Supplemental Complaint fails to state a claim against the defendant herein, in that it is alleged affirmatively that some person, other than the C. H. Elle Construction Company, a corporation, paid the said judgment referred to in said action.

Dated this 5th day of July, 1956.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Western Casualty and Surety Company, a corporation, and moves the

Court to dismiss from such action the St. Paul-Mercury Indemnity Co., a corporation, for the reason that the Court lacks jurisdiction of said plaintiff, in this, that the said original action herein was instituted by C. H. Elle Construction Co., a corporation, as plaintiff, and that no order has ever been sought or had bringing in the said St. Paul-Mercury Indemnity Co.

Dated this 5th day of July, 1956.

/s/ O. R. BAUM,

/s/ RUBY Y. BROWN,

Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 6, 1956.

[Title of District Court and Cause.]

MOTION TO STRIKE FROM ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

Come now the plaintiffs and move the Court to strike from the Answer to Amended and Supplemental Complaint heretofore filed by the defendant the following:

(a) All of that portion of said Answer to Amended and Supplemental Complaint designated as Third Defense, for the reason that the same fails to state any defense or pleadings of a defense to the Amended and Supplemental Complaint of the plaintiffs, and that the same sets forth nothing other than evidenciary allegations.

(b) All of the Answer to Amended and Supplemental Complaint designated as Fourth Defense on the grounds and for the reason that said defense is immaterial and fails to state any matter constituting a defense to the Amended and Supplemental Complaint.

(c) All of that portion of the Answer to the Amended and Supplemental Complaint designated as the Seventh Defense on the grounds that said Seventh Defense is immaterial and fails to state a defense to the Amended and Supplemental Complaint heretofore filed.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

Affidavit of Mailing Attached.

[Endorsed]: Filed Aug. 17, 1956.

[Title of District Court and Cause.]

MINUTE ORDER

October 8, 1956

This cause came on regularly this date in open court on defendant's Motions to Dismiss & To Strike, W. F. Merrill appearing as attorney for the plaintiffs and Ben Peterson appearing as counsel for the defendants.

After a discussion by counsel of the respective parties, the Court took the Motions under advisement.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Plaintiffs hereby request the defendant to make the following admissions for the purpose of the within action only, within 10 days after service of this request.

I.

That each of the following documents exhibited with this request is genuine:

a—The Standard Combined Automobile Policy, policy No. UI 518973, issued to William S. Gagon, Soda Springs, Idaho, with a policy paid from July 22, 1954 to July 22, 1955; a copy of which policy is attached hereto.

b—That document designated as SR-21, Notice of Policy under section 5, Idaho Motor Vehicle Safety Responsibility Act, dated October 5th, 1954, signed the Western Casualty and Surety Company, Fort Scott, Kansas, by American Agencies, Inc., general agents, by A. W. Kay, Secretary, a copy of which SR-21 is attached hereto.

II.

That each of the following statements is true.

a—That the said policy noted above insured the 1954 Chevrolet six wheel two ton truck, serial No. X54F018590;

b—That on the 22nd day of August, 1954, the above described policy of insurance was in effect.

c—That on the 22nd day of August, 1954 the above described Chevrolet truck was involved in a collision with a vehicle driven by one Arnold Campbell.

d—That at the time of said collision, on the 22nd day of August, 1954, the above described 1954 Chevrolet truck was being operated by one M. Burke Horsley.

e—That on the 22nd day of August, 1954, the said M. Burke Horsley was an employee of C. H. Elle Construction Company, a corporation.

f—That on the 28th day of February, 1955 an action was filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock by Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors, by their guardian ad litem, Mary Lou Campbell, vs. C. H. Elle Construction Company, a corporation, M. Burke Horsley, Max Larson, and W. S. Gagon, praying for money damages for the alleged death of Arnold Campbell, in the amount of $100,000.00 and further praying for property damage to the vehicle of Arnold Campbell in the amount of $1,620.00.

g—That on the 23rd day of December, 1955, a Judgment was entered in the action described in paragraph f— above in favor of the plaintiffs, Mary Lou Campbell, and Terrell Ray Campbell, and Curtis Howard Campbell, minors, by their guardian ad litem, Mary Lou Campbell, against

C. H. Elle Construction Company, a corporation, and M. Burke Horsley, in the amount of $15,000.00, with costs in the amount of $371.40.

h—That the above described policy of insurance contained the following provisions, as paragraph III under Insuring Agreements:

"With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply:

"(a) To any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof, but this exclusion does not apply to a member of the same household as the named insured or to a partner, agent or employee of either;

"(b) To any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer."

i—That demand was made upon the defendant to assume the defense, costs and other obligations pursuant to the contract of insurance issued by Western Casualty and Surety Company to William S. Gagon, said demand being a letter dated March 30, 1955, addressed to Western Casualty Company, Fort Scott, Kansas, through: O. R. Baum, Attorney at Law, Carlson Building, Pocatello, Idaho; that the letter attached hereto is a true and correct copy of said letter of demand.

j—That the copy of the SR-21 attached hereto and referred to in said paragraph I b—above, is a true and correct copy of said SR-21 so filed.

k—That the statements in the said SR-*2;* are in accord with the facts.

l—That on the 22nd day of August, 1956, M. Burke Horsley, as an employee of C. H. Elle Construction Company, a corporation, requested permission to use the above described Chevrolet truck from Mrs. Jesse Gagon, wife of William S. Gagon, who thereupon granted the permission, turned over the keys of said vehicle to M. Burke Horsley, and the said M. Burke Horsley thereupon used truck pursuant to this permission so given.

m—That William S. Gagon did, subsequent to the 22nd day of August, 1954, and during the month of October, 1954, present a bill to the C. H. Elle Construction Company, a corporation, for the use of the above described 1954 Chevrolet truck on the 22nd day of August, 1954, which said bill was paid

by the C. H. Elle Construction Company, a corporation, the same being in the amount of $15.00.

n—That the said Jesse Gagon, was on the 22nd day of August, 1954, and had been for many years prior thereto, the wife of William S. Gagon.

o—That the said Jesse Gagon was the bookkeeper for and worked in the office of the Gagon Lumber Company, a lumber business owned and operated by the said William S. Gagon and Jesse Gagon.

p—That the said 1954 Chevrolet truck was a truck used in the said lumber business.

Dated this 31st day of October, 1956.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

Affidavit of Mailing Attached.

DECLARATIONS

Item 1. Name of Insured W. S. GAGON

Address SODA SPRINGS (town) CARIBOU (county) IDAHO (state)

Garage: The automobile will be principally garaged in the above town, county and state unless otherwise stated herein

Occupation of the named insured is LUMBER BUSINESS, BUILDER, HARDWARE DEALER, SELF, SODA SPRINGS

Loss Payee: Any loss under coverages D, E-1, E-2, F, G-1, H and I is payable as interest may appear to the named insured and

Item 2. Policy Period: From JULY 22, 1954 to JULY 22, 1955
12:01 A. M. standard time at the address of the named insured as stated herein

Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

	COVERAGES	LIMITS OF LIABILITY		PREMIUMS: THE WESTERN CASUALTY AND SURETY COMPANY	PREMIUMS: THE WESTERN FIRE INSURANCE COMPANY
A	Bodily Injury Liability	$ 10,000.00	each person		
		$ 20,000.00	each accident	$ 25.00	
B	Property Damage Liability	$ 10,000.00	each accident	$ 22.00	
C	Medical Payments	$	each person	$	
D	Comprehensive—Loss of or damage to the Automobile, except by Collision or Upset but including Fire, Theft and Windstorm	$			
		Actual Cash Value			$
E-1	Collision or Upset	Actual Cash Value less $ 100.00			$ 24.00
E-2	Convertible Collision or Upset Additional Payment $	Actual Cash Value			$
F	Fire, Lightning and Transportation	$ ACTUAL CASH VALUE			$ 7.00
G-1	Theft (Broad Form)	$ ACTUAL CASH VALUE			$ INCLUDED
H	Windstorm, Earthquake, Explosion, Hail or Water	$			$
I	Combined Additional Coverage including M. M. A. V.	$			$
J	Towing and Labor Costs	$10 for each disablement			$
			Total Premiums by Company	$ 47.00	$ 31.00
			Grand Total Premium $	78.00	

Item 4. Description of the automobile and facts respecting its purchase by the named insured and terms of any encumbrance:

Year of Model	Trade Name	Model	Body Type, Truck Size, Truck Load Capacity, Bus Seating Capacity	Serial Number, Motor Number	Number of Cylinders
1948	G. M. C.	FC304	2 TON TRUCK 6 WHEEL REAR DUELS	S 20201 M A 24855220	6

F. O. B. List Price or Delivered Price at Factory	Actual Cost When Purchased Including Equipment	Purchased: Month Year	New or Used	Encumbrance	Installment Payments: Number	Amount of Each	Due Date and Amount of Final Installment
Rating Symbol ___ $	$ 3000.00	7/48	NEW	$		$	$

Item 5. Use. The purposes for which the automobile is to be used are COMMERCIAL CLASS 5CA
(a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as use principally in the business occupation of the named insured as stated in item 1, including occasional use for personal, pleasure, family and other business purposes. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

Item 6. Except with respect to bailment lease, conditional sale, mortgage or other encumbrance the named insured is the sole owner of the automobile, except as herein stated NO EXCEPTIONS

Countersigned JULY 22, 19 54

at SODA SPRINGS, IDAHO By E. W. LAROILLIERE, JR. Authorized Agent

FORM UI 1070-450,00 I-600,000

THE WESTERN CASUALTY AND SURETY COMPANY

THE WESTERN FIRE INSURANCE COMPANY

FORT SCOTT, KANSAS

[illegible] insurance companies

No. U 151,972

ISSUED TO W. S. GAGON

ADDRESS SODA SPRINGS, IDAHO

REPRESENTED BY

This is to certify that this is a true and correct copy of the above numbered policy.

[signature]

Underwriter

EXPIRES JULY 22, 1955 PREMIUM $78.00

STANDARD COMBINED AUTOMOBILE POLICY

THE WESTERN FIRE INSURANCE COMPANY, of Fort Scott, Kansas

(Each a stock insurance company, herein called the company)

Severally agree with the insured, named in the declaration made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, provided The Western Casualty and Surety Company, shall be the insurer with respect to coverages A, B and C and no other and The Western Fire Insurance Company shall be the insurer with respect to coverages D, E-1, E-2, F, G-1, H, I and J and no other:

INSURING AGREEMENTS

I Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage B—Property Damage Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage C—Medical Payments

To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission.

Coverage D—Comprehensive Loss of or Damage to the Automobile, Except by Collision or Upset

To pay for any direct and accidental loss of or damage to the automobile hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

Coverage E-1—Collision or Upset

To pay for direct and accidental loss of or damage to the automobile hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile.

Coverage E-2—Convertible Collision or Upset

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile. Upon the occurrence of the first loss for which payment is sought hereunder the insured shall pay to the company the additional payment stated in the declarations. Loss caused by collision or upset occurring prior to the first loss for which payment is sought hereunder is not covered.

Coverage F—Fire, Lightning and Transportation

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water.

Coverage G-1—Theft (Broad Form)

To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage.

Coverage H—Windstorm, Earthquake, Explosion, Hail or Water

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, external discharge or leakage of water except loss resulting from rain, snow or sleet.

Coverage I—Combined Additional Coverage (including Malicious Mischief and Vandalism)

To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, riot or civil commotion, or the forced landing or falling of any aircraft or of its parts or equipment, flood or rising waters, external discharge or leakage of water (except loss resulting from rain, snow or sleet), or malicious mischief or vandalism, except that $25 shall be deducted from the amount of each determined loss resulting from malicious mischief or vandalism.

Coverage J—Towing and Labor Costs

To pay for towing and labor costs necessitated by the disablement of the automobile provided the labor is performed at the place of disablement.

II Defense, Settlement, Supplementary Payments

As respects the insurance afforded by the other terms of this policy under coverages A and B [illegible]

[illegible] groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the insured in the event of accident or traffic law violation during the policy period, not to exceed the usual charges of surety companies nor $100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(d) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

(e) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.

III Definition of Insured

With respect to the insurance for bodily injury liability and for property damage liability [illegible] "insured" includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply:

(a) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof, but this exclusion does not apply to a member of the same household as the named insured or to a partner, agent or employee of either;

(b) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such employer.

IV Automobile Defined, Trailers, Two or More Automobiles, Including Automatic Insurance

(a) Automobile. Except where stated to the contrary, the word "automobile" means

(1) Described Automobile—the motor vehicle or trailer described in this policy;

(2) Utility Trailer—under coverages A, B and C, a trailer not so described, if designed for use with a private passenger automobile, if not being used with another type automobile and if not a home, office, store, display or passenger trailer;

(3) Temporary Substitute Automobile—under coverages A, B and C, an automobile not owned by the named insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

(4) Newly Acquired Automobile—an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile.

The word "automobile" also includes under coverages D, E-1, E-2, F, G-1, H and I its equipment and other equipment permanently attached thereto.

(b) Semitrailer. The word "trailer" includes semitrailer.

(c) Two or More Automobiles. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverages A and B and separate automobiles as respects limits of liability, including any deductible provisions, under coverages D, E-1, E-2, F, G-1, H, I and J.

V Use of Other Automobiles

If the named insured is an individual who owns the automobile classified as "pleasure and business" or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile applies with respect to any other automobile, subject to the following provisions:

(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

(1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;

(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;

(4) under coverage C, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse.

VI Loss of Use by Theft—Rental Reimbursement

The company, following a theft covered under this policy, shall reimburse the named insured for expense not exceeding $5 for any one day nor totaling more than $150 or the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a substitute automobile, including taxicabs.

Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the company and the police and terminating, regardless of expiration of the policy period, on the date the whereabouts of the automobile becomes known to the named insured or the company or on such earlier date as the company makes or tenders settlement for such theft.

Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.

VII General Average and Salvage Charges

The company, with respect to such transportation insurance as is afforded by this policy, shall pay any general average and salvage charges for which the named insured becomes legally liable.

VIII Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, [illegible] is being transported between ports thereof, and is owned, maintained and [illegible] for the purposes stated as applicable thereto in the declarations.

(a) under any of the coverages, while the autom[illegible] is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) under coverages A, B and C, to liability assumed by the insured under any contract or agreement;

(c) under coverages A and B, while the automobile is used for the towing of any trailer owned or hired by the insured and not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile owned or hired by the insured and not covered by like insurance in the company;

(d) under coverages A and C, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;

(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(g) under coverage C, to bodily injury to or sickness, disease or death of any person if benefits therefor are payable under any workmen's compensation law;

(h) under coverages D, E-1, E-2, F, G-1, H, I and J, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy;

(i) under coverages D, E-1, E-2, F, G-1, H and J, to loss due to war, whether or not declared, invasion, civil war, insurrection, rebellion or revolution [illegible] to con- [illegible] [illegible] by duly constitu[illegible] [illegible]vernmental or civil authority;

(j) under coverages [illegible] E-2, F, G-1, H, I and J, to any damage to the automobile which is due an[illegible] [illegible]nfined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy;

(k) under coverages D, E-1, E-2, F, G-1, H, I and J, to robes, wearing apparel or personal effects;

(l) under coverages D, E-1, E-2, F, G-1, H, I and J, to tires unless damaged by fire or stolen or unless such loss be coincident with other loss covered by this policy;

(m) under coverages D and G-1, to loss due to conversion, embezzlement or secretion by any person in lawful possession of the automobile under a bailment lease, conditional sale, mortgage or other encumbrance;

(n) under coverages E-1 and E-2, to breakage of glass if insurance with respect to such breakage is otherwise afforded;

(o) under coverage I, to loss which either in origin or extent is caused by war, invasion, civil war, insurrection, rebellion, revolution or other warlike operations (whether or not war be declared) or civil strife arising therefrom; nor, unless such liability be specifically assumed under this policy, for loss or damage caused by acts committed by the agent of any government, whether or not legally constituted, or by the agent of any party or faction engaged in any of the aforementioned warlike operations (whether or not war be declared) or civil strife arising therefrom, except that the foregoing is not intended to exclude loss or damage caused by explosion, where covered by this policy, unless such explosion occurs during and in connection with operations of military, naval or aerial armed forces.

ADDITION, SUBSTITUTION OR ELIMINATION OF AUTOMOBILE
(ALL COVER FORMS)

ADDITIONAL PREMIUM $ 15.00
RETURN PREMIUM $

The policy is hereby amended in the following particulars

DIVISION I — AUTOMOBILE ADDED

To afford insurance with respect to the automobile described in this Division, subject to all the terms of the policy except as specifically amended herein:

Description of the Automobile and Facts Respecting Its Purchase by the Named Insured:

Year of Model	Trade Name and Body Style	Model	Serial Number / Motor Number	Number of Cylinders
1954	CHEVROLET 6 WHEEL TWO TON TRUCK		S X54F018590 M 0734876F54[illegible]	

F.O.B. List Price or Delivered Price at Factory / Rate Symbol & Age Group	Actual Cost When Purchased Including Equipment	Purchased Month, Year	New or Used	Encumbrance	Installment Payments Number	Amount of Each	Due Date and Amount of Final Installment
$	$ 3400.00	M Y 7/54	NEW	$		$	$

The automobile is unencumbered unless otherwise stated herein.

Garage: The automobile will be principally garaged at the address stated into the policy otherwise stated herein:

Use: The purposes for which the automobile is to be used are:

☐ Pleasure and Business; ☒ XX Commercial; as defined in Policy; or Class 50A

Loss Payee: Any loss under coverages of Comprehensive; Collision or Upset; Fire, Lightning and Transportation, Theft (Broad Form); Windstorm, Hail, Earthquake or Explosion; or Combined Additional Coverage is payable as interest may appear to the named insured and

NAME AND ADDRESS

DIVISION II — AUTOMOBILE ELIMINATED

To discontinue insurance with respect to the automobile described in this Division:

Year of Model	Trade Name	Model	Serial Number / Motor Number
1948	G. M. C.	F0304	S 20201 M A24856220

DIVISION III

The insurance afforded for the added automobile is only with respect to such and so many of the following coverages as are designated "Yes" opposite the coverage desired. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto:

LIMITS OF LIABILITY	COVERAGES Designate each to be effective, "Yes"		Annual Prem. Per Added Automobile	PREMIUM Additional	Return
10 thousand dollars each person 20 thousand dollars each accident	Bodily Injury Liability	( )	$	$ UNCHANGED	
10 thousand dollars each accident	Property Damage Liability	( )	$	$ "	$
$ each person	Medical Payments	( )	$	$	$
$ each insured	Extended Medical Payments	( )	$	$	$
Actual Cash Value or Amount Stated $	Comprehensive	( )	$	$	$
Actual Cash Value Less $ 100.00 Deductible	Collision or Upset	( )	$ 32.00	$ 8.00	$
Actual Cash Value or Amount Stated $ ACTUAL CASH VALUE	Fire, Lightning and Transportation	( )	$ 14.00	$ 7.00	$
	Theft (Broad Form)	( )	$ INCLUDED	INCLUDED	
	Windstorm, Hail, Earthquake or Explosion	( )	$	$	$
	Combined Additional Coverage	( )	$	$	$
$10 for each disablement	Towing and Labor Costs	( )	$	$	$
			$	$	$
			$	$	$
Rate Class	Rate Territory		Totals	$ 15.00	$

All other terms, limits and provisions of this policy remain unchanged.

Attached to and made a part of Policy No. UI 518973 of The Western Casualty and Surety Company, and/or Western Fire Insurance Company, of Fort Scott, Kansas.

Issued to WM. B. GAGON, SODA SPRINGS, IDAHO

CONDITIONS

The conditions, except conditions 1 to 19 inclusive, apply to all coverages
Conditions 1 to 19 inclusive apply only to the coverage or coverages noted thereunder

1. Notice of Accident
Coverages A, B and C

When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

2. Notice of Claim or Suit
Coverages A and B

If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

3. Limits of Liability
Coverage A

The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

4. Limit of Liability
Coverage C

The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

5. Limits of Liability
Coverages A, B and C

The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

6. Action Against Company
Coverages A and B

No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a codefendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

7. Action Against Company
Coverage C

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, nor until thirty days after the required proofs of claim have been filed with the company.

8. Financial Responsibility Laws
Coverages A and B

Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

9. Assault and Battery
Coverages A and B

Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

10. Medical Reports; Proof and Payment of Claim
Coverage C

As soon as practicable the injured person or some one on his behalf shall give to the company written proof of claim, under oath if required, and shall, after each request from the company, execute authorization to enable the company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the company when and as often as the company may reasonably require.

The company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the insured or, except hereunder, of the company.

11. Named Insured's Duties When Loss Occurs
Coverages D, E-1, E-2, F, G-1, H, I and J

When loss occurs, the named insured shall

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the named insured's failure to protect shall not be recoverable under this policy; reasonable expense incurred in affording such protection shall be deemed incurred at the company's request;

(b) give notice thereof as soon as practicable to the company or any of its authorized agents and also, in the event of theft, larceny, robbery or pilferage, to the police but shall not, except at his own cost, offer or pay any reward for recovery of the automobile;

(c) file proof of loss with the company within sixty days after the occurrence of loss, unless such time is extended in writing by the company, in the form of a sworn statement of the named insured setting forth the interest of the named insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

Upon the company's request, the named insured shall exhibit the damaged property to the company and submit to examinations under oath by anyone designated by the company, subscribe the same and produce for the company's examination all pertinent records and sales invoices, or certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the company shall designate.

12. Appraisal
Coverages D, E-1, E-2, F, G-1, H, I and J

If the named insured and the company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the company, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire, then, on the request of the named insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The named insured and the company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The company shall not be held to have waived any of its rights by any act relating to appraisal.

1d. Limit of Liability; Settlement Options; No Abandonment
Coverages D, E-1, E-2, F, G-1, H and I

The limit of the company's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, nor the applicable limit of liability stated in the declarations.

The company may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the company.

11. Payment for Loss; Action Against Company
Coverages D, E-1, E-2, F, G-1, H and I

Payment for loss may not be required nor shall action lie against the company unless, as a condition precedent thereto, the named insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

1S. No Benefit to Bailee
Coverages D, E-1, E-2, F, G-1, H, I and J

The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

(CONTINUED ON FOLLOWING PAGE)

16. Assistance and Cooperation of the Insured

Coverages A, B, D, E-1, E-2, F, G-1, H, I and J

The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

21. Assignment

Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an insured, and under coverage C while the automobile is used by such person, until the appointment and qualification of [illegible]

KANSAS ENDORSEMENT

(In case this policy is written in the State of Kansas, the following applies.)

Conditions No. 11(a) and No. 12 of this policy are hereby amended as follows, all other terms and conditions remaining unchanged:

Condition No. 11(a)—Substitute the following for the entire paragraph: (a) use every reasonable means to protect the automobile covered by this policy from any further loss; reasonable expense incurred in affording such protection shall be deemed incurred at the company's request.

Condition No. 12—The words "made within thirty days after receipt of proof of loss by the company" are substituted for the words "made within sixty days after receipt of proof of loss by the company" as they appear in this condition.

All other provisions of condition No. 12 remain unchanged.

SHORT RATE TABLE (For One Year Policies)

Days Policy in Force	Per Cent of 1 Yr. Prem.
1	5%
2	6
3-4	7
5-6	8
7-8	9
9-10	10
11-12	11
13-14	12
15-16	13
17-18	14
19-20	15
21-22	16
23-25	17
26-29	18
30-32 (1 mo.)	19
33-36	20
37-40	21
41-43	22
44-47	23
48-51	24
52-54	25
55-58	26
59-62 (2 mos.)	27
63-65	28
66-69	29
70-73	30
74-76	31
77-80	32
81-83	33
84-87	34
88-91 (3 mos.)	35
92-94	36
95-98	37
99-102	38
103-105	39
106-108	40
109-113	41
114-116	42
117-120	43
121-124 (4 mos.)	44
125-127	45
128-131	46
132-135	47
136-138	48
139-142	49
143-145	50
147-149	51
150-153 (5 mos.)	52
154-156	53
157-160	54
161-164	55
165-167	56
168-171	57
172-175	58
176-178	59
179-182 (6 mos.)	60
183-187	61
188-191	62
192-196	63
197-200	64
201-205	65
206-209	66
210-214 (7 mos.)	67
215-218	68
219-223	69
224-228	70
229-232	71
233-237	72
238-241	73
242-246 (8 mos.)	74
247-250	75
251-255	76
256-260	77
261-264	78
265-269	79
270-273 (9 mos.)	80
274-278	81
279-282	82
283-287	83
288-291	84
292-296	85
297-301	86
302-305 (10 mos.)	87
306-310	88
311-314	89
315-319	90
320-323	91
324-328	92
329-332	93
333-337 (11 mos.)	94
338-342	95
343-346	96
347-351	97
352-355	98
356-360	99
361-365 (12 mos.)	100

16. Assistance and Cooperation of the Insured
Coverages A, B, D, F-1, E-2, F, G-1, H, I and J

The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

17. Subrogation
Coverages A, B, D, E-1, E-2, F, G-1, H, I and J

In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

18. Other Insurance
Coverages A, B, D, E-1, E-2, F, G-1, H, I and J

If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to said automobiles or otherwise.

19. Other Insurance
Coverage C

The insurance afforded with respect to other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible medical payments insurance applicable thereto.

20. Changes Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

21. Assignment Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an insured, and under coverage C while the automobile is used by such person, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

22. Cancelation This policy may be canceled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

23. Terms of Policy Conformed to Statute Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued are hereby amended to conform to such statutes.

24. Declarations By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, The Western Casualty and Surety Company has caused this policy, with respect to coverages A, B and C and such other parts of the policy as are applicable thereto to be executed and attested, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized agent of the company.

E. L. Gordon
Secretary

Ray B. Weboc
President

In Witness Whereof, The Western Fire Insurance Company has caused this policy, with respect to coverages D, E-1, E-2, F, G-1, H, I and J and such other parts of the policy as are applicable thereto, to be executed and attested, but this policy shall not be valid unless countersigned on the declarations page by a duly authorized agent of the company.

E. L. Gordon
Secretary

Ray B. Weboc
President

Ed. February 1951

TEXAS EXCEPTION—If this policy is issued in or the insured is a resident of Texas or the insurance afforded applies while the automobile is in the State of Texas, (1) the word "sixty" in Condition 11 (c), Insured's Duties When Loss Occurs, shall read "ninety-one"; and when loss occurs, the insured shall file proof of loss with the company within ninety-one days after the occurrence of loss; and (2) under the Insuring Agreements, Coverage I, Combined Additional Coverage (including Malicious Mischief and Vandalism), is amended by deleting any coverage with respect to Malicious Mischief and Vandalism, policy Exclusion (i) is amended to apply also to Coverage I and policy Exclusion (o) is deleted in its entirety; and (3) the cancelation of this policy is subject to the exceptions as provided in the Texas Automobile Insurance Manual.

KANSAS ENDORSEMENT

(In case this policy is written in the State of Kansas, the following applies.)

Conditions No. 11(a) and No. 12 of this policy are hereby amended as follows, all other terms and conditions remaining unchanged:

Condition No. 11(a)—Substitute the following for the entire paragraph: (a) use every reasonable means to protect the automobile covered by this policy from any further loss; reasonable expense incurred in affording such protection shall be deemed incurred at the company's request.

Condition No. 1[illegible] words "made within thirty days after receipt of proof of loss by the company" are substituted for the words "made within sixty days after receipt [illegible] proof of loss by [illegible] company" as they appear in this condition.

All other provisions of [illegible] No. 1[illegible] remain unchanged.

SHORT RATE TABLE (For One Year Policies)

Days Policy in Force — Per Cent of 1 Yr. Premium Earned

[illegible]

(Copy) March 30, 1955

Western Casualty Company
Fort Scott, Kansas

Through:
O. R. Baum,
Attorney at Law,
Carlson Building,
Pocatello, Idaho.

Re: Campbell vs. C. H. Elle Construction Co., Gagon, et al.

Gentlemen:

On February 28, 1955, there was filed an action in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, entitled Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell, Minors, by their Guardian Ad Litem, Mary Lou Campbell, plaintiffs, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, defendants.

This action grows out of an accident on August 22, 1954, in the vicinity of Soda Springs, Idaho, involving one Arnold Campbell, now deceased, driver of one of the vehicles, and a 1954 Chevrolet Truck owned by W. S. Gagon, and driven by M. Burke Horsley, an employee of C. H. Elle Construction Co. C. H. Elle Construction Co., and its employees are insured by St. Paul-Mercury Indemnity Company, who have engaged us to protect their interest in the matter.

It is our understanding that W. S. Gagon carried

automobile and liability insurance covering the 1954 Chevrolet Truck with the Western Casualty Company.

On behalf of the C. H. Elle Construction Company, we hereby notify you that C. H. Elle Construction Company claims protection as an additional insuree under the policy of W. S. Gagon, and, therefore, defense of the above-described action is hereby tendered to the Western Casualty Company as insurance carrier of the said W. S. Gagon.

Please be further advised that in view of the necessity of filing appearance to avoid default against C. H. Elle Construction Company, M. Burke Horsley and Max Larsen, we have filed on behalf of each, a separate demurrer and motion to strike.

The above notification and tender of defense is written confirmation of the oral notification and tender heretofore presented to O. R. Baum, attorney at law, Pocatello, Idaho, as the attorney for W. S. Gagon and Western Casualty in the above-entitled action.

Sincerely yours,

MERRILL & MERRILL,

By ....

WFM:lr

2983-C

Notice of Policy Under Section 5 of Idaho Motor Vehicle Safety Responsibility Act.

Date of accident: August 22, 1954. Place of accident: Highway 30, 3 Miles West of Soda Springs, Idaho.

Description of Vehicle involved in accident: Year or Model: 1954. Trade Name: Chevrolet. Model and Body type: 6 wheel 2 ton truck. Serial No. K54F018590. Motor No. 9734876F54H.

Vehicle operated by Burke Horsley, Soda Springs, Idaho and owned by Wm. S. Gagon, Soda Springs, Idaho.

The company signatory hereto gives notice that its policy numbered UI 518973 issued to Wm. S. Gagon, Soda Springs, Idaho, is an automobile liability policy affording limits of $5,000/$10,000 bodily injury and $1,000 property damage, which policy was in effect on the date of the above described accident.

Does this policy apply to the above owner: Yes (x) No ( )

Does this policy apply to the above operator: Yes (x) No ( )

The Western Casualty & Surety Co., Fort Scott, Kansas.

American Agencies, Inc.
General Agents.
/s/ By A. W. McKay,
Secretary.

Date: Oct. 5, 1954.

(Reverse Side)

List drivers of any other vehicles involved in the accident: Arnold Campbell, Soda Springs, Idaho.

[Endorsed]: Filed November 1, 1956.

[Title of District Court and Cause.]

RESPONSE TO REQUEST FOR ADMISSIONS

The defendant makes the following admissions and denials on the request for admission served on the defendant on the 1st day of November, 1956, by C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, the plaintiffs:

Request I

(a) Defendant admits I-a.

(b) Defendant states that the copy of the document referred to in I-b served on defendant is not legible and defendant has no knowledge or information concerning the instrument and therefore denies the request.

Request II

(a) That the said policy referred to was issued to W. S. Gagon and referred to a 1954 Chevrolet truck under the terms and conditions set forth in said policy and not otherwise.

(b) Defendant admits that on the 22nd day of August, 1954, the said policy of insurance, in accordance with its terms, had been issued and not cancelled.

(c) Admits II-c.

(d) Admits II-d.

(e) Answering II-e, defendant states that the said M. Burke Horsley was an employee of C. H. Elle Construction Company and was in the line,

scope and course of his employment as an employee of the C. H. Elle Construction Company.

(f) Defendant admits the statements contained therein, and states that the said William S. Gagon was made a party defendant under certain conditions and that the said complaint in such action alleged that the said M. Burke Horsley was driving said truck with the permission of the said William S. Gagon, which fact was denied by the said defendant and was likewise denied by the said plaintiffs herein, and that the said jury exonerated the said William S. Gagon from any liability growing out of said accident.

(g) Answering II-g, defendant admits the same and further states that the said judgment entered in said action was in favor of the said William S. Gagon and against C. H. Elle Construction Company and M. Burke Horsley as stated in said paragraph, a copy of which said judgment is hereto attached and made a part hereof as fully and completely as if copied herein at length.

(h) Answering II-h, defendant admits that the said policy contains paragraph as numbered, but states that the policy contained many other provisios, and that said paragraph contained only a part of the terms and conditions of said policy and that the quoted provisions of said policy, together with the other provisions in said policy are inapplicable in the present action and that the permissive use referred to in the first section of the quoted paragraph in Request II-h has already been decided adversely to the plaintiffs in the action in the Dis-

trict Court of the Fifth Judicial District of the State of Idaho in and for the County of Bannock.

(i) Answering Request II-i, defendant admits that a demand was made as stated in said letter dated March 30, 1955, but states that under the coverage contract held by William S. Gagon no one except the named insured could give permission for the truck to be used and the coverage apply, and the said O. R. Baum, as attorney for the defendant, so advised the said counsel for the said plaintiffs herein.

(j) Answering Request II-j, defendant states that the furnishing of SR-21, if one was filed, is not evidence of permissive use of the vehicle described herein nor as to any statutory obligation on the part of this defendant; that the copy referred to in said Request II-j which was served upon the defendant is illegible and is attached hereto for the Court's consideration.

(k) Answering Request II-k, defendant states that it is unable to state whether or not the statements so purported to be in the said SR-21 are in accordance with the facts, and states that the named insured in said policy never gave permission for the truck to be used and that the said purported SR-21, if one was filed, should not have been filed and that there was no requirement under the provisions of the statute of the State of Idaho and under the conditions under which said truck was being used for such a form to be filed, if one was filed.

(l) Answering Request II-l, defendant objects to the admission sought by said request II-l as be-

ing irrelevant and immaterial, but if the court finds that it is states that the statement as made in such request is not the true fact but states that William S. Gagon was the named insured in said policy referred to and that the named insured was never contacted for permission to use the said truck and never gave permission that said truck could be used, and further states that if the request had been made to the named insured for the use of the truck for the use to which it was put such request would have been denied; that on the day in question the said M. Burke Horsley, being unable to locate the said named insured, went to the home of the said named insured and there requested permission of his wife, Jessie Gagon, and that she turned the keys over to the said M. Burke Horsley; that at said time and place the said Jessie Gagon was not acting as an agent or servant or employee of William S. Gagon, nor acting for or on behalf of the community; that in the action in the state court, as heretofore referred to, the plaintiff alleged that the said truck was being driven with the permission of the said named insured and the jury found contrary to such statement, and the said plaintiffs herein denied that said truck was being used with the permission of the said William S. Gagon.

(m) Answering Request 11-m, the defendant objects upon the ground that the state of facts sought to be admitted is irrelevant and immaterial.

(n) Answering Request II-n, defendant admits the same.

(o) Answering Request II-o, defendant admits that Jessie Gagon works on the books of said business conducted by the said William S. Gagon, but denies that the said business referred to was operated by the said William S. Gagon and Jessie Gagon, and states that the said William S. Gagon operated a lumber business, and states that the said Jessie Gagon was without authority and was not the agent, servant or employee of the said William S. Gagon in authorizing the use of the vehicle referred to herein by M. Burke Horsley.

(p) Answering Request II-p, defendant states that the said matters sought to be admitted are irrelevant and immaterial, and states that if the Court finds that they are not, then defendant admits that said truck was under the control and supervision of said named insured William S. Gagon when used in his business.

O. R. BAUM,
RUBY Y. BROWN,
BEN PETERSON,
Attorneys for Defendant.

Duly Verified.

[Note: Notice of Policy Under Section 5 of Idaho Motor Vehicle Safety Responsibility Act is the same as set out at pages 58-59 of this printed record. Order dated December 28, 1955 and signed by Henry McQuade, District Judge is set out at pages 40-41.]

[Endorsed]: Filed November 9, 1956.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Defendant hereby requests the plaintiffs to make the following admissions for the purpose of the within action only, within 10 days after service of this request:

I.

That the documents exhibited with this request are genuine, to wit:

Saint Paul-Mercury Indemnity Company, Multiple Coverage Policy No. 6210145, and The Riders and Insurance Agreement,

copies of which are hereto attached, and insured the C. H. Elle Construction Company against any loss by reason of bodily injury.

II.

That each of the following statements is true:

(a) That the said policy noted above insured C. H. Elle Construction Company and the said insurance company agreed to pay on behalf of the said insured C. H. Elle Construction Company all sums which insured became obligated to pay by reason of the liability imposed upon the insured by law.

(b) That on the 22nd day of August, 1954, the above policy of insurance was in effect and payment of the judgment in the case of Mary Lou Campbell, et al., vs. C. H. Elle Construction Co., et al., was made by said plaintiff herein, St. Paul-Mercury

Indemnity Company under and by virtue of the insuring provisions of said policy.

(c) That M. Burke Horsley was employed by the C. H. Elle Construction Company, and at the time of said accident or collision was in the line, course and scope of his employment as such employee.

(d) That in the action entitled Mary Lou Campbell et al., vs. C. H. Elle Construction Company, et al., judgment was rendered in favor of the plaintiffs and against the C. H. Elle Construction Company, the named insured of the plaintiff herein, and against M. Burke Horsley, the named insured's agent, servant and employe, and judgment was against the plaintiffs and in favor of the defendant William S. Gagon, he being a defendant in said cause, and said complaint alleging that the 1954 Chevrolet truck was being operated by M. Burke Horsley with the consent and permission of William S. Gagon.

(e) That the said C. H. Elle Construction Company in the said action referred to in the preceding paragraph denied that said 1954 Chevrolet truck was being operated with the permission of the said William S. Gagon, by and through its present counsel of record, Merrill and Merrill.

(f) That after the rendition of said judgment in said action wherein Mary Lou Campbell et al. were plaintiffs and C. H. Elle Construction Company, et al., were defendants, the judgment so rendered against the said defendants C. H. Elle Construction

Company and M. Burke Horsley was paid by the said plaintiff St. Paul-Mercury Indemnity Co., a corporation, without consultation of or notice to the said defendant herein.

III.

That the said policy of insurance issued by the St. Paul-Mercury Indemnity Company contained the following provision:

> "The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law * * *"

IV.

That the C. H. Elle Construction Company and the plaintiff St. Paul-Mercury Indemnity Company filed a document designated as SR-21, pursuant to the provisions of the statutes of the State of Idaho, namely, Sec. 5, Idaho Motor Vehicle Safety Responsibility Act, and that it was signed on behalf of said plaintiff St. Paul-Mercury Indemnity Company.

V.

That the named insured in said policy issued to said William S. Gagon was William S. Gagon only.

VI.

That the policy of insurance issued to William S. Gagon, namely, Policy No. Ui 518973, issued by the Western Casualty and Surety Company, a corporation, contained the following coverage:

"To pay on behalf of the insured all sums

which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, * * *"

VII.

That the judgment in the said action filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, was in favor of the plaintiffs and against the defendants C. H. Elle Construction Company and M. Burke Horsley, and was in favor of the defendant William S. Gagon, and in the same action, and that an ascertainment was had therein that the said William S. Gagon was not legally obligated to pay any damages.

VIII.

That in the said action referred to and filed in the District Court of the Fifth Judicial District of the State of Idaho, the only person who became obligated by law to pay any sums of money to the plaintiffs was the said C. H. Elle Construction Company, and that the St. Paul-Mercury Indemnity Company paid said judgment.

IX.

That the said firm of Merrill & Merrill, Attorneys at Law, defended the said C. H. Elle Construction Company and the said M. Burke Horsley at the request of the said St. Paul-Mercury Indemnity Company, one of the plaintiffs herein.

X.

That the plaintiff, St. Paul-Mercury Indemnity Company, through its counsel, directed the defense of the said action so filed in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, and that the same counsel appeared for C. H. Elle Construction Company in the action filed in the District Court of the State of Idaho as appears in the present action for each of the said plaintiffs.

Dated this 6th day of November, 1956.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
/s/ BEN PETERSON,
Attorneys for Defendant.

Acknowledgment of Service Attached.

SAINT PAUL-MERCURY INDEMNITY COMPANY

St. Paul, Minnesota
A Capital Stock Company
Daily Report

Multiple Coverage Policy

Policy No. 6210145, Deposit Premium $1,297.47.

Issued to C. H. Elle Construction Company, 390 Yellowstone Avenue, Alameda, Bannock Co., Idaho.

The Saint Paul-Mercury Indemnity Company (Herein referred to as the Company), in consideration of the payment of the agreed premium(s) and subject to the terms of this Policy and its Insuring

Agreements, Agrees to Indemnify or Pay to or on Behalf of the Insured in Accordance With Such Insuring Agreements, With Respect to the Occurrence of Any of the Therein Mentioned Casualties or Events During the Policy Period.

General Conditions

1. Policy Period — The Policy Period with respect to any Insuring Agreement shall begin at 12:01 A. M. on the date stated in such Insuring Agreement and ends at noon of the effective date of the cancellation of this policy as an entirety or the cancellation of such Insuring Agreement, as hereinafter provided, whichever cancellation shall first occur. If, subsequent to the date hereof, any Insuring Agreement is made a part of this policy by mutual agreement, then the Policy Period with respect to such Insuring Agreement shall begin on the date stated therein, and if, prior to the cancellation of this policy as an entirety, any Insuring Agreement is terminated, as hereinafter provided then noon of the effective date of such termination shall be the end of the Policy Period with respect to such Insuring Agreement.

2. Limit of Liability—The limit(s) of the Company's liability as expressed in this Policy shall not be:

(a) cumulative from year to year, or period to period, regardless of the number of premiums paid or payable;

(b) increased by the inclusion herein of, or by reference herein to, more than one party in interest

as the Insured, the one first named being deemed the named Insured and authorized agent of and entitled to priority over the others for all purposes of this Policy, and if the named Insured ceases to be covered hereunder the one next named shall thereafter be deemed the named Insured;

(c) affected by the death of any Insured, nor shall the Company be relieved of any of its obligations hereunder by the death of an Insured or the bankruptcy or insolvency of an Insured or an Insured's estate.

3. Ownership of Insured Property—The money, securities, and other property covered by this Policy may be owned by the Insured, or held by the Insured in any capacity whether or not the Insured is liable for the loss thereof, or held by others provided the Insured is legally liable for loss thereof.

4. Termination of Prior Coverage—The Insured by the acceptance of this Policy, gives notice to the Company terminating or cancelling prior bonds or policies Numbers Nil. Such termination or cancellation to be effective as of the time this Policy and its Insuring Agreements become effective.

5. Insured's Duties When Loss Occurs — (a) Upon the occurrence of any casualty or event for which coverage is afforded by this Policy, written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured, and reasonably obtainable information respecting the time, place and circumstances of the casualty or event,

and the names and addresses of the injured and of available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

(b) Upon request of the Company, the Insured shall, within a reasonable time after determining the amount of any loss, submit to the Company an itemized proof of loss, duly sworn to.

Countersigned at San Francisco, California, this 5th day of July, 1951.

P. F. McKOWN,
Resident Vice President,
By

6. Assistance and Cooperation of the Insured—The Insured shall cooperate (except in a pecuniary manner) with the Company and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the casualty or event.

7. Subrogation and Salvage—(a) In the event of any payment under this Policy, the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization, and the Insured shall execute and deliver instruments

and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

(b) Upon the payment of any loss by the Company all money or other property recovered on account of any loss, by whomsoever such recovery shall have been made, shall belong to the Company except that if any loss exceeds the limit of the Company's liability on account of such loss, the Insured shall be entitled to all recovery thereon until fully reimbursed for such excess loss.

8. Defense, Settlement, Supplementary Payments—As respects any insurance afforded by the terms of this Policy, the Company shall:

(a) defend in the name and on behalf of the Insured any suit against the Insured alleging injury, sickness or disease, damage or destruction, and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;

(b) Pay all premiums on bonds to release attachments not in excess of the limits of liability of the Policy, or to effect appeals in such defended suit(s), or to guarantee the Insured's appearance in court if such appearance is required by reason of an accident or traffic violation arising out of use of an automobile with respect to which use insurance is afforded under this Policy, but without any obligation to apply for or furnish such bonds; all costs

taxed against the Insured in any such suits; all expenses incurred by the Company; all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limits of the Company's liability thereon; and expenses incurred by the insured in the event of bodily injury, sickness or disease, for such immediate medical and surgical relief to others as shall be imperative at the time of the casualty or event.

(c) reimburse the insured for all reasonable expenses incurred at the Company's request other than loss of earnings.

The Company agrees to pay the amounts incurred under this Section (8), except settlement of claims and suits, in addition to the applicable limits of liability expressed in any Insuring Agreement.

9. No Additional Premium — Payment by the Company of any obligation hereunder shall not entitle the Company to an additional or reinstatement premium unless otherwise stated in the Insuring Agreement providing for such payment.

10. Cancellation—This Policy as an entirety (including all Insuring Agreements) or any Insuring Agreement may be cancelled (a) by agreement between the Insured and the Company; or (b) by the Insured serving upon the Company written notice stating when thereafter such cancellation shall be effective; or (c) by the Company serving upon the Named Insured at the address shown in this Policy written notice, or sending such notice by registered mail, stating therein the date when such cancella-

tion shall be effective, but such date, if the notice be served, shall be not less than 30 days after such service, or if sent by registered mail, not less than 35 days after the date borne by the sender's registry receipt. The mailing of notice as aforesaid shall be sufficient proof of its delivery to the Insured. The unearned premium, if any, computed pro rata, if cancelled by the Company, or short rate if cancelled by the Insured shall be refunded as soon as practicable after cancellation becomes effective.

11. Other Insurance — No Insuring Agreement hereof shall apply to any loss if the Insured is, or would be but for the existence of such Insuring Agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any other such policy or policies, bond or bonds, had such Insuring Agreement not been effective.

12. Changes—No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy; nor shall the terms of this policy be waived or changed except by endorsement issued to form a part hereof, signed by the President, a Vice-President, a Secretary, or an Assistant Secretary of the Company.

13. Premium, Inspection and Audit — The premium for which this Policy is written shall be an estimated premium only. At the end of each annual period the earned premium shall be computed in

accordance with the rate agreed upon. If the earned premium, thus computed, exceeds the estimated premium paid, the Insured shall pay the excess to the company, if less, the company shall return to the Insured the unearned portion paid, subject, however, to the agreed upon annual minimum premium. The company shall be permitted, at all reasonable times, to inspect the Insured's premises, plants, works, machinery, elevators, appliances and operations and to examine and audit the Insured's books and records during the Policy Period, and within 3 (illegible) as they relate to the premium bases or the subject matter of the insurance granted by this Policy. The Insured shall (illegible) to the company submit reports of work completed, gross receipts from all operations and payroll expended.

14. Continuity of Prior Coverage—(a) The coverage of any Insuring Agreement shall, Unless Otherwise Stated in Such Insuring Agreement, apply to any loss occurring during the term of any prior bond or bonds or policy or policies of insurance, herein referred to as prior insurance, carried by the Insured, provided:

(1) such loss is one to which the coverage of such Insuring Agreement would have applied had the loss occurred during the effective period of such Insuring Agreement, and

(2) that such prior insurance had not terminated prior to the effective date of such Insuring Agreement, and

(3) that the period allowed for discovery of loss

under such prior insurance had elapsed prior to the discovery of such loss, and

(4) that the Company shall be liable for no more than the amount of coverage in effect under such prior insurance when the loss occurred, or the amount of insurance granted under this Policy, whichever is less.

(b) Where the period allowed for discovery of loss under any other Bond or Policy of insurance, herein referred to as prior insurance, issued by the Company to the Insured, had not elapsed at the time of the substitution of the coverage of this Policy for the coverage of such prior insurance, the Company's liability under this Policy and under such prior insurance shall not be cumulative as to any loss(es) (1) caused by any act(s) or omission(s) of any one person or act(s) or omission(s) in which such person is concerned or implicated, or (2) resulting from or in respect to any one casualty or event.

15. Valuations—For the purpose of any loss settlement the value of any securities shall be their quoted market value on the business day next preceding the discovery of the loss or at the time of the settlement of the loss whichever amount shall be the larger; and the value of any subscription, conversion, redemption or deposit privileges shall be their quoted market value immediately preceding the expiration thereof. If such securities or such privileges have no quoted market value, their value shall be determined by agreement or arbitration. In case

of any loss or destruction of, or damage to, any property insured hereby, other than securities, the Company shall not be liable for more than the actual cash value thereof, or for more than the actual cost of repairing such property or of replacing same with property or material of like quality or quantity or value. The Company may, at its option, pay such actual cash value, or make such repairs or replacements.

16. Assignment—No assignment of interest hereunder shall bind the Company without its written consent; but if any Insured shall die or be adjudged bankrupt or insolvent, any coverage granted hereunder shall cover such Insured's legal representative, in his capacity as such, as an Insured, with respect to any casualty or event covered by this Policy, provided that notice of such death or adjudication is given to the Company within 60 days after the date thereof.

17. Action Against Company—No action shall lie against the Company, unless as a condition precedent thereto, the Insured shall have fully complied with all of the terms of this Policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insur-

ance afforded by this Policy. Nothing contained in this Policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability.

18. Fraud and Misrepresentation — This Policy shall be void if the Insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the Insured pertaining to this insurance or the subject thereof, whether before or after a loss. However, unintentional errors or omissions on the part of the Insured shall not operate to prejudice the rights of the Insured under this Policy.

19. Special Statutes—Any and all terms of this Policy which are in conflict with the statutes of any State in which coverage is granted are understood, declared and acknowledged by the Company to be amended to conform with such statutes.

In Witness Whereof, the Saint Paul-Mercury Indemnity Company has caused this Policy to be executed and attested, but this Policy and any Insuring Agreements or Riders shall not be valid unless signed by an officer or an agent or an Attorney-in-fact of the Company.

Rider No. VII

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that the Limits of Liability are amended as follows:

A. Bodily Injury Liability Including automobile, $100,000.00 Each Person, $300,000.00 Each Occurrence, $300,000.00 Aggregate Products & completed Operations.

This Rider shall take effect on the 1st day of July, 1955.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Co. of Alameda, Idaho, by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at Pocatello, Idaho this 5th day of July, 1955.

Turner Ins. Agency,

By ....

A. B. Jackson,

President.

Rider No. VI

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that with respect to work performed by the Insured on the Bannock County Court House, Pocatello, Idaho, the limits are amended as follows:

Coverage — Bodily Injury (including Auto)—$100,000.00 Each Person, $200,000.00 Each Occurrence, $200,000.00 Aggregate Products & completed Operations.

This Rider shall take effect on the 8th day of December, 1953.

Forming part of Policy No. 6210145 issued to

C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 14th day of December, 1953.

P. F. McKown,
Resident Vice President,

By ....

A. B. Jackson,
President.

Rider No. V

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that with respect to the work to be done by the Insured in connection with the following two jobs the Coverage A—Bodily Injury (except automobile) Limits of Liability are amended to read: $100,000.00 Each Person, $200,000.00 Each Occurrence, $200,000.00 Aggregate Products & completed Operations.

1) Green Acres School — Oak Street, Alameda, Idaho.

2) Lewis and Clark School—Alameda Road and McKinley, Alameda, Idaho.

This Rider shall take effect on the 28th day of April, 1953.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 12th day of May, 1953.

P. F. McKown,
Resident Vice President,

By ....

A. B. Jackson,
President.

Rider No. IV

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that the restrictions imposed by Rider No. III of this Insuring Agreement shall not apply to the following vehicle or its replacement: 1952 Ford 2 Ton Dump Truck M# F6M-2KC2 517.

This Rider shall take effect on the 20th day of August, 1952.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 17th day of December, 1952.

P. F. McKown,
Resident Vice President,

By ....

A. B. Jackson,
President.

Rider No. III

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that all coverage is excluded for work performed by the Insured at Mountain Home Air Force Base Defense Housing Project IDA-1-D-1 located Mountain Home, Idaho.

It is further agreed with respect to automobile coverage that only those vehicles specifically assigned to the Mountain Home Air Force Base Job are excluded.

/s/ ....

C. H. Elle Construction Co.

This Rider shall take effect on the 20th day of August, 1952.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 9th day of October, 1952.

P. F. McKown,
Resident Vice President,

By ....

A. B. Jackson,
President.

Rider No. II

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that coverage is excluded for all lia-

bility arising out of the Insured's operations as a joint adventuror with Reynolds & Walker, Inc. on the Jerome Memorial Hospital Job in Jerome, Idaho.

/s/ ....

C. H. Elle Construction Co.

This Rider shall take effect on the 15th day of June, 1951.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 27th day of June, 1952.

P. F. McKown,
Resident Vice President,

By ....

A. B. Jackson,
President.

Rider No. I

Applicable to the Comprehensive General and Automobile Liability Insuring Agreement.

It is agreed that the Limits of Liability under Section C Property Damage Liability Other than Automobile is hereby amended as follows: $50,000.00 Each Occurrence, $300,000.00 Aggregate Operations, $300,000.00 Aggregate Protective, $300,000.00 Aggregate Contractual, $300,000.00 Aggregate Products and completed Operations.

This Rider shall take effect on the 29th day of February, 1952.

Forming part of Policy No. 6210145 issued to C. H. Elle Construction Company of Alameda, Bannock Co., Idaho by the St. Paul-Mercury Indemnity Insurance Company, St. Paul, Minn.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

Countersigned at San Francisco, Calif. this 12th day of March, 1952.

A. B. Jackson,
President.

Sections A and C (Aggregate Products and Completed Operations):

The limits of bodily injury liability and property damage liability stated as "aggregate products and completed operations" are respectively the total limits of the Company's liability for all damages arising out of the handling or use of or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured or caused by operations, other than pick-up and delivery and the existence of tools, uninstalled equipment and abandoned or unused materials, when the occurrence takes place away from premises owned, rented or controlled by the Insured and after the Insured has relinquished possession of such goods or products to others or after the operations have been completed or abandoned at the place of occurrence. All such damages arising out of one prepared or acquired lot of goods or prod-

ucts shall be considered as arising out of one occurrence.

Sections B and C:

All damage arising out of a continuous or repeated exposure to substantially the same condition shall be considered as arising out of one occurrence.

Section C:

The limit of Property Damage liability stated as "aggregate operations" is the total limit of the Company's liability for all damages arising out of damage to or destruction of property, including the loss of use thereof, caused by or arising out of operations of the Insured away from premises owned, leased or rented by the Insured.

The limit of Property Damage liability stated as "aggregate protective" is the total limit of the Company's liability for all damages arising out of damage to or destruction of property including the loss of use thereof, caused by operations performed for the Insured by independent contractors or omissions of supervisory acts of the Insured in connection therewith, except maintenance or ordinary alterations and repairs on premises owned or rented by the Insured.

The limit of Property Damage liability stated as "aggregate contractual" is the total limit of the Company's liability for all damages arising out of damage to or destruction of property, including the loss of use thereof, with respect to each contract.

The limits stated apply separately to each project with respect to operations being performed away

from premises owned or rented by the named Insured.

Elevators and Premises:

The terms of this Insuring Agreement shall apply separately to each elevator and each location insured hereunder.

3—Cross Liability:

With respect to this Insuring Agreement the inclusion of more than one Insured under this Policy shall not in any way affect the rights of any such Insured either as respects any claim, demand, suit or judgment made, through any or in favor of any other Insured, or by or in favor of any employee of such other Insured. This Insuring Agreement shall protect each Insured in the same manner as though a separate policy had been issued to each; but nothing contained in this paragraph shall operate to increase the Company's liability as set forth elsewhere in this Insuring Agreement beyond the amount or amounts for which the Company would have been liable if only one person or interest had been named as Insured.

4—Territory:

This Insuring Agreement applies to occurrences taking place within the United States of America. With respect to automobiles, this Insuring Agreement applies to occurrences which occur while the automobiles are within the United States of America, its territories or possessions, Canada, or while being transported between ports thereof in that part of Mexico within seventy-five (75) miles of the United States boundary line.

5 — Financial Responsibility Laws — Sections A and B:

Such insurance as is afforded by this Insuring Agreement for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any State or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the Policy Period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this Policy.

Inapplicable Policy Conditions

Paragraphs 3, 14 and 15 of the General Conditions of the Policy do not apply with respect to this Insuring Agreement.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

P. F. McKown,
Resident Vice President,

By ....

M. D. Price,
President.

Comprehensive General and Automobile
Liability (Broad Form)
Insuring Agreement

This Insuring Agreement shall take effect on the 15th day of June, 1951.

Attached to and forming part of Contract of Insurance No. 6210145 issued to C. H. Elle Construc-

tion Company of Alameda, Bannock Co., Idaho by the Saint Paul-Mercury Indemnity Company, St. Paul, Minnesota.

Countersigned at San Francisco, California this 5th day of July, 1951.

No insurance is provided under any of the following Sections unless so indicated by entries showing the Company's limit of liability.

The limit of the Company's liability under each such Section shall be as stated therein, subject to all of the terms of this Policy and Insuring Agreement having reference thereto.

Section A. Bodily Injury Liability (Including Automobile): Limits of Liability: $50,000.00 each person, $100,000.00 each occurrence, $100,000.00 aggregate products and completed operations.

Section B. Automobile Property Damage Liability: Limits of Liability: $100,000.00 each occurrence.

Section C. Property Damage Liability Other Than Automobile: Limits of Liability: $50,000.00 each occurrence, $100,000.00 aggregate operations, $100,000.00 aggregate protective, $100,000.00 aggregate contractual, $100,000.00 aggregate products and completed operations.

I. Section A—Bodily Injury Liability (Including Automobile):

The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages, including damages for care and loss of services, because

of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons.

II. Section B — Automobile Property Damage Liability:

The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages because of damage to or destruction of property, including the loss of use thereof, arising out of the ownership, maintenance or use of any automobile.

III. Section C — Property Damage Liability Other Than Automobile:

The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages because of damage to or destruction of property, including the loss of use thereof.

Exclusions

This Insuring Agreement Does Not Apply:

(a) except with respect to operations performed by independent contractors, to aircraft:

(b) under Section A (except with respect to liability assumed under contract) to:

1—Bodily Injury to or sickness, disease or death of any employee of the named Insured while engaged in the employment of the Insured, other than domestic employees with respect to the operation, maintenance or repair of an automobile, or

2—Any obligation for which the Insured may be

held liable under any Workmen's Compensation Law;

(c) under Section B, to damage to or destruction of property owned by rented to in charge of or being transported by or for the Insured;

(d) under Section C, except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of automobiles while away from the premises (or the ways immediately adjoining) owned, leased, rented or controlled by the Insured;

(e) under Section C, to damage to or destruction of

1—any goods or products manufactured, sold, handled or distributed by the Insured, or work completed by or for the Insured out of which the damage or destruction arises;

2—(a) any property owned, leased, used, or rented by the Insured or held by the Insured for sale, any property being transported by or on behalf of the Insured, or, except with respect to liability assumed under sidetrack agreements or the use of elevators or escalators, any personal property in his possession;

(b) That specific part of any property upon which operations are being performed by or on behalf of the Insured at the time of the damage or destruction thereof;

(f) to the restoration, repair, or replacement of buildings, structures, property or other work made necessary by faulty workmanship thereon.

Special Conditions

Such insurance as is provided by this Insuring Agreement applies only in connection with the business, occupational or commercial pursuits of the Insured except as respects the liability arising out of the ownership, operation or maintenance of automobiles insured hereunder.

1—Definitions

(a) Insured

The unqualified word "Insured" wherever used also includes any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such.

The coverage afforded under this Insuring Agreement with respect to automobiles owned by, registered in the name of, or hired by the Insured, is extended to any other person, firm or corporation while using or legally responsible for the use thereof, provided such use is with the permission of an Insured, who is the legal or registered owner of or hires the automobile, and if such Insured is an individual he may give such permission through an adult member of his household other than a domestic servant or chauffeur.

This extension of coverage does not apply:

(1) to any person, firm or corporation or to any agent or employee thereof operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(2) with respect to an automobile while used with any trailer not covered by like insurance in

the Company; or with respect to a trailer, while used with any automobile not covered by like insurance in the Company;

(3) with respect to any hired automobile, to the owner thereof or an employee of such owner;

(4) with respect to any non-owned automobile, to any executive officer if such automobile is owned in full or in part by him or a member of his household.

(b) Automobile

The word "automobile" shall mean a land motor vehicle trailer or semi-trailer, provided the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described; any crawler-type tractor, farm implement, farm tractor or trailer not subject to motor vehicle registration, ditch or trench digger, power crane or shovel, grader, scraper, roller, well drilling machinery, asphalt spreader, concrete mixer and mixing and finishing equipment for highway work, other than a concrete mixer of the mix-in-transit type. The word "trailer" shall include semi-trailer.

"Owned Automobile" shall mean an automobile owned in full or in part by an Insured named in the Policy.

"Hired Automobile" shall mean an automobile used under contract in behalf of a named Insured provided such automobile is not owned in full or in part by or registered in the name of (a) a named Insured or (b) an executive officer thereof or (c) an employee or agent of a named Insured

who is granted an operating allowance of any sort for the use of such automobile.

"Non-owned Automobile" shall mean any other automobile.

2—Limits of Liability

Section A

The limit of bodily injury liability applicable to "each person" is the limit of the Company's liability for any damages, including damages for care and loss of services arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one occurence; the limit of such liability applicable to "each occurrence" is, subject to the above provisions respecting each person, the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one occurrence.

Sections A and B

The terms of this Policy shall apply separately to each automobile insured hereunder but a motor vehicle and a trailer or trailers attached thereto shall be considered to be one automobile as respects limits of liability.

Insuring Agreement

This Insuring Agreement shall take effect on the 15th day of June, 1951.

Attached to and forming part of

Contract of Insurance No. 6210145 issued to C. H.

Elle Construction Company of Alameda, Bannock Co., Idaho, by the Saint Paul-Mercury Indemnity Company, St. Paul, Minnesota. Countersigned at San Francisco, California, this 5th day of July, 1951.

The Company Agrees to pay the reasonable expense for necessary medical, surgical, ambulance, hospital and professional nursing services and, in the event of death resulting from such injury, the reasonable funeral expense, all incurred within one year from the date of the accident to or for each person who sustains bodily injury caused by accident, while in or upon, entering or alighting from:

I—Any private passenger automobile owned or hired by the named Insured if the injury arises out of the use thereof by or with the permission of the named Insured, or

II—Any other automobile while being used by or in behalf of the named Insured or spouse, if the injury arises out of the use thereof and results from:

(A) the operation of said automobile by the named Insured or spouse or any private chauffeur or domestic servant of either, or

(B) the occupancy of said automobile by the named Insured or spouse.

Exclusions

This Insuring Agreement Does Not Apply:

(a) (1) To bodily injury to or sickness, disease or death of any employee of the named Insured while engaged in the employment of the Insured,

other than domestic employees with respect to the operation, maintenance or repair of an automobile, or

(2) To any obligation for which the Insured may be held liable under any Workmen's Compensation Law;

(b) under Division II to:

(1) any automobile hired as part of a frequent use of hired automobiles by or furnished for regular use to, the named Insured or a member of his household other than a private chauffeur or domestic servant;

(2) any automobile while used in the business or occupation of the named Insured or spouse, if operated by a person other than the named Insured or spouse or such chauffeur or servant unless the named Insured or spouse is present in such automobile;

(3) any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place.

Special Conditions

Definitions—"Automobile"

The word "automobile" shall mean a land motor vehicle, trailer or semi-trailer, provided the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described; any crawler-type tractor, farm implement, farm tractor or trailer not subject to motor vehicle registration, ditch or trench digger, power crane or shovel, grader,

scraper, roller, well drilling machinery, asphalt spreader, concrete mixer and mixing and finishing equipment for highway work, other than a concrete mixer of the mix-in-transit type. The word "trailer" shall include semi-trailer.

"Owned Automobile" shall mean an automobile owned in full or in part by the Insured named in the Policy.

"Hired Automobile" shall mean an automobile used under contract in behalf of the named Insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named Insured, or (b) an executive officer thereof, or (c) an employee or Agent of the named Insured who is granted an operating allowance of any sort for the use of such automobile.

"Non-owned Automobile" shall mean any other automobile.

Limit of Liability—$500.00 shall be available for each person who sustains Bodily Injury or death covered by this Insuring Agreement.

Medical and Other Reports; Examination—The injured person or someone on his behalf shall, as soon as practicable after each request from the Company, furnish reasonably obtainable information pertaining to the accident and injury, and execute authorization to enable the Company to obtain medical reports and examine records. The injured person shall submit to physical examination by physicians selected by the Company when and as often as the Company may reasonably require.

Proof, and Payment of Claim—As soon as prac-

ticable after completion of the services or after the rendering of services which in cost equal or exceed the limit of liability for this insurance or after the expiration of one year from date of the accident, whichever is first, the injured person or someone on his behalf shall give to the Company written proof of claim under oath, stating the name and address of each person and organization which has rendered services, the nature and extent and the dates of rendition of such services, the itemized charges therefor and the amounts paid thereon. Upon the Company's request, the injured person or someone on his behalf shall cause to be given to the Company by each such person and organization written proof of claim under oath, stating the nature and extent and dates of rendition of such services, the itemized charges therefor and the payments received thereon.

The Company shall have the right to make payment at any time to the injured person or to any such other person or organization on account of the services rendered, and a payment so made shall reduce to the extent thereof the amount payable hereunder to or for such injured person on account of such injury. Payment hereunder shall not constitute admission of liability of the Insured or of the Company.

Territory—This Insuring Agreement applies to occurrences or accidents taking place while the automobiles are within the United States of America, its territories or possessions, Canada, or while being transported between ports thereof, or in

that part of Mexico within seventy-five (75) miles of the United States boundary line.

Inapplicable Policy Conditions

Paragraphs 3, 5b, 7, 8, 14 and 15 of the General Conditions of the Policy do not apply with respect to this Insuring Agreement.

Not valid until countersigned by an officer or an agent or an attorney-in-fact of the Company.

M. D. PRICE,
President,
P. F. McKown,
Resident Vice President,
By:

[Endorsed]: Filed November 9, 1956.

[Title of District Court and Cause.]

RESPONSE TO DEFENDANT'S REQUEST FOR ADMISSIONS

The plaintiffs make the following admissions and denials to the Request for Admissions served on the plaintiffs on the 8th day of November, 1956 by the defendant, Western Casualty and Surety Company, a corporation:

Request I.

Plaintiffs admit the multiple coverage policy No. 6210145 and the riders and insurance agreement as attached to the Request for Admissions are genuine, but plaintiffs deny that said policy "insured the

C. H. Elle Construction Co. against any loss by reason of bodily injury," but insures only those losses covered by the wording of said policy.

Request II.

(a) Plaintiffs admit that the policy referred to insured C. H. Elle Construction Company, but denies that said insurance company agreed to pay on behalf of the said insured, C. H. Elle Construction Company, all sums which insured became obligated to pay by reason of the liability imposed upon the insured by law, and states that the coverage of said policy is contained in the wording of said policy, which also includes as Paragraph 11 under "General Conditions", the following:

"Other Insurance—No Insuring Agreement hereof shall apply to any loss if the Insured is, or would be but for the existence of such Insuring Agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any other such policy or policies, bond or bonds, had such Insuring Agreement not been effective."

(b) Plaintiffs admit that on the 22nd day of August, 1954, the above policy of insurance was in effect and admit that the payment of the judgment in the case of Mary Lou Campbell, et al, v. C. H. Elle Construction Co., et al, was made by the plaintiff herein, St. Paul-Mercury Indemnity Co., but states that said payment was made after refusal of the defendant herein to assume coverage according to its insurance contract.

(c) Admitted.

(d) Plaintiffs admit that in the action entitled Mary Lou Campbell, et al. v. C. H. Elle Construction Co., et al, judgment was rendered in favor of the plaintiffs and against C. H. Elle Construction Co. and against M. Burke Horsley, agent and servant of C. H. Elle Construction Co.; and that judgment was against the plaintiffs and in favor of the defendant William S. Gagon; but plaintiffs deny that the Complaint in the above described action alleged that the 1954 Chevrolet Truck was being operated by M. Burke Horsley with the consent and permission of William S. Gagon.

(e) Denied.

(f) Plaintiffs admit that the judgment so rendered against the defendants C. H. Elle Construction Co. and Mr. Burke Horsley was paid by St. Paul-Mercury Indemnity Co., but plaintiffs deny that said payment was made without consultation of or notice to the said defendant herein.

Request III.

Plaintiffs admit that the policy of insurance issued by the St. Paul-Mercury Indemnity Co. contained, among other provisions, the portion quoted in Request III.

Request IV.

Denied.

Request V.

Admitted.

Request VI.

Plaintiffs admit that the policy of insurance

issued to William S. Gagon by the defendant herein contained, among other provisions, the portions quoted in Request VI.

Request VII.

Plaintiffs admit that the judgment in the District Court of the 5th Judicial District of the State of Idaho in and for the County of Bannock was in favor of the plaintiffs and against the defendants C. H. Elle Construction Co. and M. Burke Horsley and was in favor of the defendant, William S. Gagon; but plaintiffs deny the balance of Request VII.

Request VIII.

Denied.

Request IX.

Plaintiffs admit that the firm of Merrill & Merrill, attorneys at law, defended C. H. Elle Construction Co. at the request of the St. Paul-Mercury Indemnity Co. and plaintiffs admit that Merrill & Merrill, attorneys at law, appeared as co-counsel on behalf of M. Burke Horsley at the request of the said St. Paul-Mercury Indemnity Co., the other counsel representing M. Burke Horsley being O. R. Baum, attorney at law, Pocatello, Idaho.

Request X.

Plaintiffs deny that the plaintiff St. Paul-Mercury Indemnity Co., through its counsel, directed the action of said action so filed in the 5th Judicial District of the State of Idaho in and for the

County of Bannock, stating that the defense of said action was jointly conducted by Merrill & Merrill who appeared as counsel for C. H. Elle Construction Co. and as co-counsel for M. Burke Horsley and Max Larsen, said individuals also appearing by and through their attorney, O. R. Baum, attorney at law, Pocatello, Idaho, and O. R. Baum, attorney at law, Pocatello, Idaho, who appeared for and on behalf of William S. Gagon, defendant in said action. Plaintiffs admit that the same counsel appeared for C. H. Elle Construction Co. in the action filed in the District Court of the State of Idaho as appears in the present action for the plaintiffs herein.

Respectfully submitted,

MERRILL & MERRILL,
/s/ By WESLEY F. MERRILL,
Attorneys for Plaintiffs.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 19, 1956.

[Title of District Court and Cause.]

PLAINTIFFS' ADDITIONAL REQUEST FOR ADMISSIONS

Whereas defendant in its response to Request for admissions served on the 8th day of November, 1956, in answer to Request I(b) stated that the copy referred to therein was not legible, plaintiffs

hereby request the defendant to make the following admissions for the purpose of the within action only, within ten days after service of this Request.

I.

That each of the following documents exhibited with this Request is genuine.

(a) That document designated as "SR 21 Notice of Policy Under Section 5 of Idaho Motor Vehicle Safety Responsibility Act" dated Oct. 5, 1954, signed "The Western Casualty & Surety Co., Fort Scott, Kansas by American Agencies, Inc., General Agents by A. W. Kay, Secretary," a copy of which SR 21 is attached hereto.

Dated this 16th day of November, 1956.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

[Note: Document designated as "SR 21 Notice of Policy Under Section 5 of Idaho Motor Vehicle Safety Responsibility Act" is the same as set out at pages 58-59]

Acknowledgment of Service Attached.

[Endorsed]: Filed November 19, 1956.

[Title of District Court and Cause.]

RESPONSE TO PLAINTIFFS' ADDITIONAL REQUEST FOR ADMISSIONS

The defendant makes the following responses and denials to request for additional admissions.

Request I.

States that the Company itself has no knowledge that document designated as SR-21, Notice of Policy Under Sec. 8 of the Idaho Motor Vehicle Safety Responsibility Act, dated October 5, 1954, was ever signed; that the only information that the Company had as to the accident referred to in such exhibit is that it was given by the insured William S. Gagon to the L M Insurance Agency at Soda Springs, Idaho, which information undoubtedly was forwarded. Your affiant states that if the SR-21 referred to was signed in the manner that is shown on the Request that the same was signed without having adequate, proper and correct information; that inquiry is being made this day from the Company at Fort Scott, Kansas, and likewise from the American Agency for an explanation of such exhibit; that additional information is being sought for the purpose of answering such request; that this answer is being signed by counsel for the defendant, although letters are out asking for correct information as to why the said SR 21 was signed, if it ever was signed.

That a special agent for the Company called the undersigned, Attorney for defendant, by phone, and

certain information was obtained, and the undersigned understands that a statement was also made by William S. Gagon to the special agent. Whether that was by phone or otherwise, the undersigned is unable to state.

/s/ O. R. BAUM,
/s/ BEN PETERSON,
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 26, 1956.

[Title of District Court and Cause.]

DEPOSITIONS OF JESSIE GAGON and WILLIAM GAGON, Taken by Plaintiffs

This Cause came regularly on for hearing, pursuant to Notice of Taking Deposition filed herein, in the Bannock County Courthouse, Pocatello, Idaho, on Tuesday, November 20th, 1956, at the hour of eleven thirty a.m., before Ray D. Bistline, a Notary Public for the State of Idaho, residing at Pocatello therein, for the taking of the depositions of Jessie Gagon and William S. Gagon, on behalf of the Plaintiffs; the plaintiffs not appearing in person but by their counsel, W. F. Merrill, Esq., of the firm of Merrill & Merrill, attorneys at law, Pocatello, Idaho; and the defendant not

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* Page numbers appearing at top of page of Original Deposition.

appearing in person but by Hon. O. R. Baum, and Ben Peterson, Esq., both of Pocatello, Idaho; [2]

Whereupon, the following proceedings were had, to-wit:

Mr. Merrill: Let the record show, Mr. Bistline, that this matter came on for hearing pursuant to Notice of Taking Depositions, and subpoenas served on Mrs. Jessie Gagon and Mr. William S. Gagon; that said matter was continued by agreement of counsel from Saturday, November 17th, 1956, at eleven o'clock a.m., until this time, Tuesday, November 20th, 1956, at eleven thirty o'clock a.m.

Judge Baum: And that the agreement continuing the matter until this time was to accommodate counsel for the defendant. The defendant, however, does not waive his right to waive any questions as to the depositions and to their right to take the depositions, it being agreed merely that the depositions could be taken at this hour in lieu of the hour set in the subpoenas.

Mr. Merrill: That was for the accommodation of counsel for the defendant?

Judge Baum: That is right. But all other objections are reserved.

Mr. Merrill: And will you waive the signing of the depositions by the witnesses?

Judge Baum: Yes; that will be satisfactory.

Mr. Merrill: You may be sworn, Mrs. Gagon, please. [3]

Whereupon,

MRS. JESSIE GAGON

called as a witness by the plaintiffs, having been by me first duly sworn to testify to the truth, the whole truth, and nothing but the truth, deposed and testified as follows:

Direct Examination

Q. (By Mr. Merrill): Would you state your full name, please? A. Jessie Gagon.

Q. And where do you live?

A. Soda Springs, Idaho.

Q. And to whom are you married?

A. William S. Gagon.

Q. May I ask approximately how long you have been married to Mr. Gagon?

A. Since 1929.

Q. And you were married to Mr. Gagon then on August 22nd, 1954? A. Yes, sir.

Q. Is there a Gagon Lumber Yard in Soda Springs? A. Yes, sir.

Q. And who owns that?

A. William S. Gagon. [4]

Q. Is that your husband? A. Yes, sir.

Q. Do you do any work or help with the operation of that lumber yard?

A. I keep the books.

Q. And in August of 1954 who was keeping the books? A. I was keeping the books.

Q. You were doing the bookkeeping for the entire lumber business? A. Yes, sir.

Q. As bookkeeper do you have occasion to go

(Deposition of Mrs. Jessie Gagon.)

to the lumber yard offices and remain there at any time?

A. Oh, about one thirty in the afternoon, or perhaps two thirty, and I stay until I have finished up the books for that day.

Q. Now, Mrs. Gagon, you are aware of an accident that occurred on August 22nd, 1954, involving a truck driven by Bert Horsley and a car driven by Arnold Campbell? A. Yes.

Q. Now directing your attention then to that day, August 22nd of 1954,——

Judge Baum: Mr. Merrill, pardon me. Could we have it understood that each side reserves all objections to [5] any questions?

Mr. Merrill: Yes, Judge Baum.

Judge Baum: Now, if you would read him the question, Mr. Reporter?

(Pending question read by Reporter as above recorded.)

Q. (Mr. Merrill, continuing): Directing your attention to the day of August 22nd, 1954, was there on that day a 1954 Chevrolet truck owned by the Gagon Lumber Yard?

A. Yes; we had a Chevrolet truck.

Q. On that day did anyone ask you for the use of that truck? A. Yes.

Q. And who asked you? A. Bert Horsley.

Q. Where does Bert Horsley live?

A. In Soda Springs.

Q. Now at that time, on August 22nd, 1954, did you know for whom Mr. Horsley was working?

(Deposition of Mrs. Jessie Gagon.)

A. No. He worked for himself.

Q. Did you know that he was working for the C. H. Ellie Construction Company at that time?

A. I understood he had a job with Mr. Elle. [6]

Q. At that time? A. Yes.

Q. Now, where were you when you were asked about the truck? A. I was home.

Q. And how were you contacted?

A. By phone.

Q. And you were asked if the truck could be borrowed; is that correct?

A. He asked if he could borrow the truck, and if he could have it if I would get the keys for him.

Q. And then what did you do?

A. Well, after, I went to the lumber yard and got the keys for him.

Q. Do you remember what day of the week it was? A. Yes, I remember. It was Sunday.

Q. Was the lumber yard closed? A. Yes.

Q. Did you have keys to the lumber yard?

A. Yes, sir.

Q. And those were the keys that you used to get into the lumber yard?

A. Yes; I opened the door. [7]

Q. And where was the key to the truck? Do you recall?

A. It was on the cash register, where it is usually kept.

Q. That is its usual place? A. Yes, sir.

Q. And did Mr. Horsley meet you at the lum-

(Deposition of Mrs. Jessie Gagon.)

ber yard? A. Yes; he met me there.

Q. And was there anyone with him?

A. No.

Q. And then what did you do when Mr. Horsley got there?

A. I just gave him the keys and locked the door and went away, and he went away.

Q. Who drove the truck out of the lumber yard?

A. Mr. Horsley.

Q. Could you tell us whether or not there was any discussion as to payment for the use of the truck at that time? A. No.

Q. Was there any discussion as to payment for the gas and oil used? A. No.

Q. Would you state whether or not you were aware that Mr. Horsley had prior to this time borrowed equipment from the Gagon Lumber Yard?

A. No.

Q. So far as you are aware, he had not?

A. No.

Q. Was this 1954 Chevrolet truck used in the Gagon Lumber Yard business? A. Yes.

Q. Do you know whether or not that truck was involved in an accident that day? A. Yes.

Q. Would you tell us, Mrs. Gagon, whether or not arrangements were ever made after that date for payment for the use of the truck?

A. Yes.

Q. And who made those arrangements, if you know? A. Mr. Gagon.

Q. And with whom?

(Deposition of Mrs. Jessie Gagon.)

A. I don't know that. There was a slip made for the charge, and it was in the regular drawer with the other slips.

Q. Did you make out the slip? A. No.

Q. Who did? A. Mr. Gagon.

Q. In line with your bookkeeeping of the firm, do you [9] recall whether or not a check was received on October 6th from C. H. Elle Construction Company in the amount of $15.00?

A. No; there was no check in the amount of $15.00. There was a check that came for the entire bill.

Judge Baum: That is our original, Mr. Merrill, and we,——

Mr. Merrill: May we then withdraw it and have a copy substituted?

Judge Baum: If you will do that; yes.

Mr. Merrill: May we have this deemed marked then as Plaintiffs' Exhibit "A" for identification?

(Whereupon, Plaintiffs' Exhibit "A", the same being original ledger sheet was deemed marked by the Reporter.)

Q. (By Mr. Merrill, continuing): You mentioned that a sum was paid along with the other bill,—what other bill do you mean?

A. Well, the other bills that are charged on the ledger sheet that you have there. There were other bills that were charged to this same account.

Q. Were any of these separate items paid for separately?

(Deposition of Mrs. Jessie Gagon.)

A. No. The bill was paid in one amount by the Elle Construction Company. [10]

Q. I hand you what has been deemed marked as Plaintiffs' Exhibit "A" for identification. Would you state what that is?

A. It is a ledger sheet that was made up in the office of Gagon Lumber Company.

Q. And is that made up under your supervision? A. Yes. I made it.

Q. You made it personally? A. Yes, sir.

Q. Directing your attention to August 6th, do you find an item there of $15.00?

A. August 6th?

Q. October 6th. A. Yes.

Q. And are there any other items on that date?

A. No.

Q. Do you have any personal recollection as to what that $15.00 item would be?

A. I do, because I looked it up yesterday.

Q. You looked it up from where?

A. From our records.

Q. Those are the records you keep?

A. Yes, sir. [11]

Q. And what was that $15.00 item?

A. It was a charge for the rental of the truck.

Q. "Rental of the truck?" You mean this 1954 Chevrolet truck we are talking about?

A. Yes.

Q. Do you know where it came from, that $15.00 payment?

A. Where the $15.00 payment came from?

(Deposition of Mrs. Jessie Gagon.)

Q. Yes.

A. It came from the Elle Construction Company.

Q. From the Elle Construction Company?

A. Yes, sir.

Mr. Merrill: We offer in evidence what has been deemed marked as Plaintiffs' Exhibit "A" for identification.

Judge Baum: We reserve the right to object at the appropriate time. You will substitute a copy, will you?

Mr. Merrill: Yes, I will have one made.

Q. (By Mr. Merrill, continuing): The $15.00, Mrs. Gagon, was that put into the account of the Gagon Lumber Company? A. Yes, sir.

Q. And used in the business? A. Yes.

Q. As any other payment would have been?

A. That is right. [12]

Mr. Merrill: I think that is all, Mrs. Gagon. Thank you.

Judge Baum: Just a minute, please.

Cross Examination

Q. (By Judge Baum): What is the fact as to whether or not your husband had ever authorized you to loan any equipment?

Mr. Merrill: We object to that on the ground it calls for a conclusion of the witness.

Q. (Judge Baum, continuing): Just state the fact, please. A. No.

(Deposition of Mrs. Jessie Gagon.)

Q. Had you at any time ever loaned any of the equipment of your husband to Bert Horsley?

A. No.

Q. Or to anybody else? A. No.

Q. Had the equipment, so far as you know, ever been loaned to Bert Horsley before? A. No.

Q. This particular truck, what is the fact as to whether or not your husband had ever given you authority to loan it to Mr. Horsley? [13]

Mr. Merrill: We object on the same ground. It calls for a conclusion of the witness.

Q. (Judge Baum, continuing): Answer, please.

A. No.

Q. Describe the nature of your employment, please.

A. I keep the books for the Gagon Lumber Company, and I am a house wife.

Q. And you have no part in the operation of the business other than keeping the books?

A. No.

Q. Do you ever buy for the company?

A. No.

Q. Do you bid on contracts? A. No.

Q. Do you have anything to say about the operation of the company? A. No.

Q. Who does? A. William S. Gagon.

Q. And that prevailed in August of 1954?

A. Yes.

Q. Was your husband home on August 22nd, 1954? A. No. [14]

Q. Where was he, if you know?

(Deposition of Mrs. Jessie Gagon.)

A. He was fishing on Snake River.

Q. He was out of the state then, was he?

A. Yes.

Q. What time was it,—were you home when your husband got home that evening? A. No.

Q. When you came home what time was it?

A. Oh, perhaps six to six thirty.

Q. And did you advise your husband about the truck?

A. Yes; he had come home and he was asleep and I woke him and told him.

Q. Was that before or after the accident?

A. It was after the accident. I would say six thirty to seven o'clock, — something like that. I couldn't be sure as to the exact time.

Q. You didn't report that you had loaned the truck prior to the accident? A. No.

Q. This statement that opposing counsel asked you about, did you have a bill that had been left in the drawer, or where your bills were kept, that caused you to extend that on the books? [15]

A. Yes, sir.

Judge Baum: May we have that, Mr. Merrill?

Mr. Merrill: Yes.

Judge Baum: No; the other. And will you mark this for identification as Defendant's Exhibit No. 1, Mr. Reporter?

> (Defendant's Exhibit No. 1, for identification, R. D. B., the same being charge slip, was marked by the Reporter.)

Q. (Judge Baum, continuing): The ledger sheet

(Deposition of Mrs. Jessie Gagon.)

that was shown to you by Mr. Merrill contains an item of October 6th, 1954. Was that about the time that that bill was extended on your books?

A. Yes, sir.

Q. And what was that charge on this slip based upon? Where did you get the information?

A. Well, from our original sales slip.

Q. Did you have any record prior to the charge on this sales slip of any charge for the use of that truck? A. No.

Q. I hand you a sales slip; what date does it bear? A. October 6th, 1954.

Q. Is that the first information you had as to a rental [16] for that truck? A. Yes.

Q. Had there been any item for rental extended on your books prior to that date? A. No.

Q. And in whose handwriting is that exhibit?

A. William S. Gagon's.

Q. And where did you find that sales slip?

A. In the drawer with the other sales slips.

Q. Was that about on the date that bears?

A. Yes, it would have been about that date. Sometimes I don't post every day, but it would have been the following day.

Judge Baum: That is all.

Redirect Examination

Q. (By Mr. Merrill): Mrs. Gagon, the Gagon Lumber Company is an individual ownership, isn't it? A. Yes, sir.

Q. Owned by you and your husband?

(Deposition of Mrs. Jessie Gagon.)

A. No; owned by my husband.

Q. Owned by your husband?

A. Yes, sir. [17]

Q. And you are married to him?

A. Yes, sir.

Q. And have been since about 1922, did you say?

A. No; since 1929.

Q. How long had Mr. Gagon been out of town on this fishing trip?

A. He went on Saturday afternoon.

Q. That would be August 21st? A. Yes.

Q. The day before the accident?

A. Yes, sir.

Q. And I believe you stated there was no conversation between you and Mr.,—no arrangement between you and Mr. Horsley as to rental at the time he took the truck?

A. Yes. There was no arrangement for rental. There were no arrangements for rental at that time.

Q. No arrangement to pay for the gas, or anything? A. No.

Mr. Merrill: I think that is all.

Judge Baum: That is all, Mrs. Gagon.

Mr. Merrill: You may step down, Mrs. Gagon.

(Witness excused.)

(Waiving of deposition being signed. See page 3.) [18]

DEPOSITION OF WILLIAM S. GAGON

Mr. Merrill: We will call Mr. William S. Gagon.

Whereupon,

WILLIAM S. GAGON

called to testify by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Merrill): Will you state your name, please? A. William S. Gagon.

Q. And where do you live?

A. Soda Springs, Idaho.

Q. And you are the husband of Mrs. Jessie Gagon who just testified here? A. I am.

Q. Are you the owner of the Gagon Lumber Yard at Soda Springs, Idaho? A. I am.

Q. Now, directing your attention to August 22nd of 1954, could you state whether or not there was a 1954 Chevrolet truck owned by you at that time? A. There was, sir.

Q. There was? A. Yes, sir. [19]

Q. And that was used in the lumber business?

A. Yes, sir.

Q. Do you happen to know where the truck actually was on August 22nd, 1954? A. No.

Q. Where was it the last time you saw it?

A. In the lumber yard, in the back of the yard.

Q. And when was that?

A. Well, I think it was the morning of the 21st, before I went fishing.

Q. Was that prior to the time the business was closed for Saturday?

(Deposition of William S. Gagon.)

A. The business doesn't close on Saturday.

Q. It closes in the evening?

A. At six o'clock; yes.

Q. And did you see it around six o'clock that night? A. I wasn't there.

Q. When did you leave on the 21st of August?

A. Oh, it was in the morning.

Q. This 1954 Chevrolet truck was involved in an accident on August 22nd, 1954, was it not?

A. Yes.

Q. Did you go to the scene of the accident with anyone [20] after it happened?

A. With anyone? No, I went by myself.

Q. The next day after the accident, on August 23rd, did you go with Mr. Bert Horsley to the scene of the accident?

A. I don't think I did. I don't remember.

Q. Will you state whether or not you had ever reported this Chevrolet truck as a stolen vehicle on August 22nd, 1954?

Judge Baum: To which we object as incompetent, irrelevant and immaterial, and not within the issues.

Q. (Mr. Merrill, continuing): You may answer now. A. I did not.

Q. Mr. Gagon, would you state what company, insurance company, had the liability and property damage insurance to cover this truck?

A. I think the Western.

Q. Would that be the Western Casualty and Surety Company? A. Yes, sir.

(Deposition of William S. Gagon.)

Q. Would you state whether or not you reported this accident to them?

A. I reported it to Mr. Mathews.

Q. And what connection does Mr. Mathews have with the Western Casualty and Surety Company?

A. He was the agent, I think, for them.

Q. Would you state whether or not you advised Mr. Mathews as to the facts of the accident?

A. I just told him that the truck was in a wreck.

Q. Did you advise him as to the facts, what you knew about it.

A. Yes; the condition of the truck.

Q. Would you state, prior to August 22nd, 1954, whether or not you had ever loaned equipment to Mr. Bert Horsley as an employee of the C. H. Elle Construction Company?

A. I had never loaned any; no.

Q. Isn't it a fact that he borrowed an item of your equipment to carry some steel forms just shortly before that? A. No.

Q. You have no recollection of that?

A. No.

Q. What arrangements do you have with the C. H. Elle Construction Company for borrowing or loaning vehicles between yourselves?

A. I have none.

Q. Do you have a general understanding with the president of that company? A. Yes. [22]

Q. And is that,—what are the terms of that general understanding?

(Deposition of William S. Gagon.)

A. There is nothing. There has been no discussion on loaning equipment at all.

Q. You have loaned it to him before?

A. No.

Q. You have never loaned it before August 22nd, 1954? A. No.

Q. Had he ever borrowed from you prior to that time? A. No.

Q. Mr. Gagon, did you send the C. H. Elle Construction Company a bill for the use of this vehicle? A. I did.

Q. And in what amount? A. $15.00.

Q. Was that paid? A. Yes.

Q. Would you state whether or not that was for the use of this vehicle on August 22nd, 1954?

A. It was rent for the truck.

Q. For the use of the truck on August 22nd, 1954? A. Yes, sir.

Q. What was the amount of that that you billed him? [23] A. $15.00.

Q. And do you know how that was paid by the C. H. Elle Construction Company?

A. By check, with the rest of the bill.

Q. What happened to the check? Do you know?

A. It was deposited in the bank.

Q. And used in your account?

A. Yes, sir.

Q. Would you tell us whether or not you discussed this damage to your truck with any other representative of the Western Casualty and Surety Company except Mr. Mathews?

(Deposition of William S. Gagon.)

A. Later on; yes.

Q. And with whom did you discuss it?

A. I couldn't tell you his name. He was, I think, a special agent.

Q. Do you know where he came from?

A. Salt Lake.

Q. And you discussed what you understood as to the facts of this accident? A. Yes, sir.

Q. And this gentleman with whom you had the discussion was a,—represented himself to be an agent of Western Casualty and Surety Company?

A. Yes, sir.

Mr. Merrill: I believe that is all. Thank you, Mr. Gagon.

Cross Examination

Q. (By Judge Baum): This representative, before you discussed it with him, whom did you call?

A. I called my attorney, Mr. O. R. Baum.

Q. And your discussions pertained to the value of the truck, did it not? A. Yes, sir.

Q. And it didn't pertain to anything else, did it? Is that all? A. That is all.

Q. The value of the truck. That was many days later, was it not? A. Yes, considerable.

Q. How many days later would that be?

A. Oh, I couldn't say.

Q. Well, was it the following week, or a month or so?

A. I imagine it was ten or twelve days.

Q. You were asked about a $15.00 item. Do you know when that charge was made? [25]

(Deposition of William S. Gagon.)

A. It was made the sixth.

Q. The sixth of what? October?

A. October, I think.

Q. And there is an exhibit there,——

Judge Baum: Mr. Reporter, will you hand him that proposed exhibit?

Q. (Judge Baum, continuing): In whose handwriting is that exhibit?

A. That is my hand writing.

Q. And was that made on the date it bears?

A. Yes.

Q. And it was made by you, was it?

A. Yes.

Q. At whose direction?

A. At my attorney's, O. R. Baum's.

Q. Were you fully compensated for the loss of your truck? A. No.

Q. What did that bill have to do with reference to your loss that you had not been paid for?

A. It just reimbursed me for some of it.

Q. And do you know how you arrived at the amount? A. The amount of,—— [26]

Q. The amount of that bill?

A. Oh, we just figured that was about the right amount.

Q. Up until that time had any entry been made on any your books as to any rental?

A. No.

Q. Until this conversation was had with your attorney, at any time had there ever been any idea of you sending a statement for rent? A. No.

(Deposition of William S. Gagon.)

Q. Had you ever rented the truck to Mr. Horsley? A. No.

Q. Had you ever rented any other truck to Mr. Horsley at any time? A. No.

Q. Just speak up so the Reporter can hear you.

A. No.

Q. Had Mr. Horsley been a customer at your yard prior to August of 1954? A. Yes.

Q. For about how long?

A. Oh, five or six years.

Q. And he was in the construction business?

A. Yes. [27]

Q. Had Mr. Horsley at any time ever used your truck in connection with any purchases he had made from you? A. Yes.

A. For what purpose was that truck then used?

A. At times he would come in and place an order for me to deliver and there would be one of us there alone, and we would load our truck up and ask Mr. Horsley if he would deliver it and bring our truck back.

Q. And is that the only time that Mr. Horsley ever used your truck? A. Yes.

Q. Either before August or after that?

A. Yes.

Q. It was in reference to the sale of some merchandise by you? A. Yes, sir.

Q. Which you were obligated to deliver?

A. Yes.

Q. Did Mr. Elle, or any other of your agents, ever borrow your truck in August of 1954?

(Deposition of William S. Gagon.)

A. No.

Q. Or at any other time? A. No. [28]

Q. What is the fact as to whether or not you had ever authorized Mrs. Jessie Gagon to loan the truck in question?

Mr. Merrill: That is objected to as calling for a conclusion of the witness; incompetent, irrelevant and immaterial.

Q. (Judge Baum, continuing): You may answer, please. A. The question, please?

Judge Baum: Would you read it to him, Mr. Reporter, please?

(Whereupon, the pending question was read by the Reporter as above recorded.)

A. I never had authorized her.

Q. (Judge Baum, continuing): Did you at any time ever authorize Jessie Gagon to loan any of your equipment? A. No.

Q. Either before or after August of 1954?

A. No.

Q. Do you know of any occasion in the past where Jessie Gagon had loaned any of your equipment? A. No.

Q. Opposing counsel asked you something about Mr. Mathews. Do you recall what you said to Mr. Mathews? [29]

A. I went in to Mr. Mathews and told him the Chevrolet truck, the two-ton truck, had been in an accident, and I would like to have the adjustor come up so I could get a new truck and notify the company.

(Deposition of William S. Gagon.)

Q. And that is all you stated to him?

A. Yes, sir.

Q. Did you ever talk to him after that concerning that truck? A. No.

Q. Where did you sign your Proof of Loss in reference to that truck?

A. In Mr. O. R. Baum's office.

Q. From whom did you receive the papers you signed, the Proof of Loss?

A. The General Adjustment Bureau.

Q. And you took it where?

A. To my attorney, Mr. O. R. Baum.

Q. And left it there? A. Yes, sir.

Q. What is the fact, Mr. Gagon, as to whether or not if you had been home and Mr. Horsley would have asked you for the use of that truck for the use to which he was putting it, would you have loaned it to him? [30]

Mr. Merrill: That is objected to on the ground it is incompetent, irrelevant and immaterial, and on the further ground it calls for a conclusion of the witness.

A. No.

Q. (Judge Baum, continuing): In other words, as I understand you, unless it was in connection with the delivery of some merchandise you had sold, you would never have permitted anybody to use that truck; is that right? A. Yes.

Judge Baum: That is all.

(Deposition of William S. Gagon.)

Redirect Examination

Q. (By Mr. Merrill): Now, Mr. Gagon, you only talked to Mr. Mathews and the special agent so far as anyone connected with the Western Casualty and Surety Company is concerned?

A. Yes, sir.

Q. And from your discussion with this special agent from Salt Lake,—all you discussed was the value?

A. That is all I knew what to discuss.

Q. Did you and he arrive at a value?

A. No.

Q. Was any amount subsequently paid to you for the damage to the truck? [31] A. Yes.

Q. By the Western Casualty and Surety Company? A. Yes, sir.

Q. Did you ever sign any statement as to how the accident occurred, or what you knew about the facts of the accident? A. No.

Q. Did you ever discuss the actual facts of the accident with anybody?

A. I didn't know the actual facts.

Q. With anybody connected with the Western Casualty and Surety Company?

A. I didn't know the actual facts in regard to the wreck.

Q. Did you ever discuss what you did know?

A. I didn't know anything.

Q. You knew it was your truck? A. Yes.

Q. Did you discuss that fact with any agent of Western Casualty and Surety Company?

(Deposition of William S. Gagon.)

A. Yes, that it was my truck.

Q. You advised them of that? A. Yes.

Q. Did you advise them as to who was driving the truck? A. No.

Q. Did you advise them as to how he came into possession of the truck? A. No.

Q. You didn't talk with anyone of the Western Casualty on those facts?

A. He asked me questions and I answered them.

Q. Did you discuss any of those facts with him?

A. No.

Q. Did you answer any questions relative to that?

A. I might have. I don't know. There are too many questions.

Q. In August of 1954 about how many other employees did you have in the lumber yard?

A. One.

Q. And what is his name?

A. Walter Gagon.

Q. What?

A. Walter,—W-a-l-t-e-r,—Walter Gagon.

Q. Your son? A. Brother.

Q. A brother of yours. I see. [33]

A. Yes, sir.

Q. Now, you were asked as to how you arrived at the amount of $15.00, and you stated it was about the right amount. About the right amount for what? A. For the use of the truck.

Q. For the use of the truck on August 22nd, 1954? A. Yes, sir.

(Deposition of William S. Gagon.)

Mr. Merrill: I think that is all.

Recross Examination

Q. (By Judge Baum): You have rented trucks yourself, haven't you? A. I have rented?

Q. Yes, from other people? A. Yes, sir.

Q. And is that the way you arrived at what this charge should be? A. Yes, sir.

Judge Baum: That is all.

Mr. Merrill: That is all, Mr. Gagon. Thank you.

(Signing of deposition waived. See page three of this deposition.) [34]

Officer's Certificate Attached.

[Endorsed]: Filed November 26, 1956.

[Title of District Court and Cause.]

MOTION FOR PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING AND PHOTOGRAPHING

Comes Now the defendant, by its counsel of record, O. R. Baum, Ruby Y. Brown, and Ben Peterson, and respectfully moves the Court for an order requiring the plaintiff to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of certain documents, papers, letters or reports, not privileged, and which constitute or contain evidence material to the question of facts brought to the attention of the plaintiff immediately after the accident and during the time that the case in the state court was pending

and up to the time of the settlement, all of which matters are in the exclusive possession of the plaintiffs, their officers or agents. The documents, matters and things referred to are as follows:

I.

The written report made by the Yellowstone Adjustment Company of Pocatello, Idaho, which report was made to the St. Paul-Mercury Indemnity Company, a corporation, such report being a written report and one based upon the investigation that was made by the Yellowstone Adjustment Company at the request of the plaintiff, St. Paul-Mercury Indemnity Company, a corporation, or Merrill & Merrill.

II.

Letter of Merrill & Merrill addressed to the St. Paul-Mercury Indemnity Company, a corporation, which letter was written after the report of the investigation which was made by the Yellowstone Adjustment Company and such report was in the hands of Merrill & Merrill.

III.

Letter from the St. Paul-Mercury Indemnity Company to Merrill & Merrill directing that such firm handle the defense for the C. H. Elle Construction Company, the defendant in the State Court and one of the plaintiffs in the present case.

IV.

The letter wherein Merrill & Merrill were di-

rected by the St. Paul-Mercury Indemnity Company to handle all matters pertaining to the said accident that was referred to in the pleadings in the State Court on behalf of C. H. Elle Construction Company.

V.

Letter from Merrill & Merrill to St. Paul-Mercury Indemnity Company seeking authority to pay judgment in the District Court action, and the reply thereto authorizing the payment of the judgment obtained in the District Court against C. H. Elle Construction Company.

VI.

Letter from St. Paul-Mercury Indemnity Company authorizing Merrill & Merrill to institute the present action in the name of C. H. Elle Construction Company.

VII.

The information sought by the defendant is sought in good faith, and attached hereto and made a part hereof is the affidavit of defendant's attorney O. R. Baum, in support of this motion.

Dated this 29th day of November, 1956.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
/s/ BEN PETERSON,
Attorneys for Defendant.

AFFIDAVIT OF O. R. BAUM

State of Idaho,
County of Bannock—ss.

O. R. Baum, being first duly sworn, on his oath states:

That he is one of the attorneys for the above named defendant and he makes this affidavit in support of the Motion for Production of Documents and Things for Inspection, Copying and Photographing which is attached hereto; that the production of the documents, papers, statements and things requested is made in good faith; that he has been informed and therefore verily believes that the matters and things so sought in said motion are competent as evidence in said cause and are especially competent by reason of the fact that the defense in the action by the said C. H. Elle Construction Company was carried on at the direction of and under the control of the plaintiff St. Paul-Mercury Indemnity Company and that such company employed counsel and at all times was in full and complete control of said defense; that the facts sought to be elicited are facts necessary to be shown and produced in said cause in the furtherance of justice and in securing all the facts competent upon the issues to be tried.

That the adjustment made by the St. Paul-Mercury Indemnity Company was made without consultation or consent of said defendant as to the advisability of such adjustment being made.

That the said plaintiff herein, St. Paul-Mercury

Indemnity Company, was at all times aware of the defense as prepared and made by the said William S. Gagon in the said state court in the State of Idaho; that no appeal was taken to the Supreme Court of the State of Idaho; that an adjustment was made, all as hereinbefore stated.

The motion herein made is made in good faith and the affiant as one of counsel for defendant desires to inspect said documents solely for the purpose of establishing facts to be used as evidence in the above entitled cause and affiant does not intend to use said information for any other purpose or to convey the same to any other party or persons.

Dated this 29th day of November, 1956.

/s/ O. R. BAUM.

Subscribed and sworn to before me this 29th day of November, 1956.

[Seal] /s/ JAYSON C. HOLLADAY,
Notary Public for Idaho.
Residing at Pocatello, Idaho.

[Endorsed]: Filed November 30, 1956.

[Title of District Court and Cause.]

MINUTE ORDER

December 3, 1956

This case came on regularly this date in open court for hearing on defendant's Motion for production of Documents and things for Inspection, copying and photographing; Wesley Merrill appearing as counsel for Plaintiffs and O. R. Baum and Ben Peterson appearing for Defendant.

After hearing counsel for the respective parties and being advised in the premises, the Court granted the Motion.

[Title of District Court and Cause.]

MINUTE ORDER

December 7, 1956—Judge Clark

Upon this matter being re-set for Court Trial on Monday, December 10, 1956 at 10 o'clock A.M., and the Court being advised in the premises, it was Ordered that the setting be vacated and the matter be submitted on depositions and briefs, the plaintiff to have 20 days to file its opening brief, the defendant to have 20 days to reply to the opening brief and the plaintiff 10 days to reply to the defendant's brief.

[Title of District Court and Cause.]

DEPOSITION OF M. BURKE HORSLEY

Taken on behalf of the plaintiffs:

State of Idaho,
County of Bannock,
District of Idaho,
Eastern Division—ss.

M. Burke Horsley, of Soda Springs, County of Caribou, State of Idaho, a witness called by the plaintiffs herein, being duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says as follows:

(Deposition of M. Burke Horsley.)

Mr. Merrill: It is stipulated between the parties through their respective counsel in this action that on this date, the 12th day of December, 1956, before Earl H. Weaver, a Notary Public for the State of Idaho, residing at Pocatello, Idaho, that the deposition of M. Burke Horsley may be taken on behalf of the plaintiffs. Wesley Merrill of Merrill & Merrill appearing for and on behalf of the [1*] plaintiffs, and O. R. Baum and Ben Peterson appearing on behalf of the defendant; that this deposition may be taken at the Courthouse in Pocatello, Bannock County, Idaho, at 1:30 o'clock p.m., December 12th, 1956.

Judge Baum: And that the deposition of C. H. Elle may be taken at this time on behalf of the defendant, and the same appearances as heretofore noted.

Mr. Merrill: And it may be stipulated that the depositions need not be signed.

Judge Baum: Yes.

Direct Examination

Q. (By Mr. Merrill): Will you please state your name? A. M. Burke Horsley.

Q. Where do you live?

A. Soda Springs, Idaho.

Q. Directing your attention to August, the 22nd, 1954, were you involved in an automobile accident on that date? A. I was.

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* Page numbers appearing at bottom of page of Original Deposition.

(Deposition of M. Burke Horsley.)

Q. And for whom were you working?

A. C. H. Elle Construction Company.

Q. And approximately, what was the location of the accident? [2]

A. Approximately four miles west of Soda Springs.

Q. At the time of the accident would you state whether or not you were in your employment and working for the C. H. Elle Construction Company?

A. I was.

Q. Now, what day of the week was it?

Judge Baum: Just a minute. We will object at this time to this line of questioning, Mr. Merrill, it is all immaterial, and we move that the answer be stricken and likewise the previous answers.

Q. (By Mr. Merrill, resuming): What day of the week was it, this accident? A. Sunday.

Q. What vehicle were you driving?

A. Driving a two ton truck belonging to Mr. Wm. Gagon.

Q. That described as a 1954 truck? 1954 Chevrolet truck? A. Yes.

Q. And would you tell us, Mr. Horsley, who you contacted to get the truck?

Judge Baum: We object as being immaterial and not within the issues.

A. Mrs. William Gagon.

Q. And how did you contact her?

A. By telephone.

Q. And where was she? [3]

A. She was at her sister's.

(Deposition of M. Burke Horsley.)

Q. And you contacted her for what purpose?

A. For the purpose of borrowing the truck.

Q. And did you get the vehicle from her?

A. I did.

Q. Where did you go to get it?

A. To the lumber yard.

Q. And who was there?

A. Mrs. Gagon and myself.

Q. Did you see who unlocked the lumber yard?

A. Mrs. Gagon.

Q. How did you get the keys?

A. Mrs. Gagon gave them to me.

Q. At the time of your taking the vehicle at the lumber yard will you state whether or not there was any discussion as to the rental of it?

A. I think not.

Q. Was there any discussion as to payment of gas and oil consumed?

A. Not that I remember.

Q. Will you state whether or not Mrs. Gagon refused to give you the keys and permission to use the truck? A. No, she didn't.

Q. After this accident, Mr. Horsley, did you advise any one in the Gagon family as to the accident? [4]

A. I called the house from the hospital and Bill wasn't there and I talked to Mrs. Gagon.

Q. And you advised her of the accident?

A. I did.

Q. Did you have occasion at any time after this

(Deposition of M. Burke Horsley.)
accident to go by the scene of the accident with Mr. William Gagon?

A. Well, as I remember it he drove me to Grace the following day.

Q. The day after the accident?

A. The day after.

Q. And you went past the scene of the accident?

A. We went past the scene of the accident.

Q. Will you state whether or not you had ever been told by Mr. Gagon that you did not have permission to use the truck?

Judge Baum: We object on the ground it is incompetent, irrelevant and immaterial and not within the issues. Go ahead.

A. Not that I remember.

Q. (By Mr. Merrill, resuming): If there had been any criminal action filed against you based upon the use of that truck without permission you would know it? A. Not that I know of. [5]

Q. You would know it if there had been?

A. I undoubtedly would.

Q. Have you ever used any equipment of Mr. Gagon's before this one day?

A. I borrowed a truck from Mr. Gagon one time previously.

Q. For what purpose?

A. To haul steel forms from Pocatello to Grace.

Q. Who were you working for?

A. C. H. Elle Construction Company.

Q. Have you had any occasion to borrow or

(Deposition of M. Burke Horsley.)
use other equipment from the Gagon Lumber Company?

Judge Baum: Objected to as too general, incompetent, irrelevant and immaterial and not tied in with the present accident, or with the C. H. Elle Construction Company.

Q. (By Mr. Merrill, resuming): Let me add to that question prior to August 22nd, 1954?

A. The only time I can think of I used to use Mr. Gagon's concrete cement mixer. We buy cement from Mr. Gagon and we have used his concrete mixer.

Q. Now, by we who do you mean?

A. Myself.

Q. Yourself. You were not working for Mr. Elle? [6] A. No.

Q. Did you make any arrangements as to placing gasoline in the vehicle before you left town?

Judge Baum: We object to that as too general.

A. I don't understand that, Mr. Merrill.

Q. (By Mr. Merrill, resuming): Let me ask you this. Where did you go immediately after you left the lumber yard at the time you borrowed this vehicle?

A. As I remember I serviced the truck before I left.

Q. And by servicing the truck what do you mean?

A. I checked the oil and filled it with gas.

Q. Was that in line of your employment with Mr. Elle?

(Deposition of M. Burke Horsley.)

A. You might say it was in line. Of course, it is something that has to be done.

Q. Yes. I believe that is all.

Cross Examination

Q. (By Judge Baum): Mr. Horsley, you said that you had borrowed this truck once before from Mr. Gagon, tell us did you ever borrow this truck before from Mr. Gagon that you know of?

A. I am not sure that I borrowed it from Mr. Gagon. I did use the truck.

Q. When you answered counsel that you borrowed it from [7] Mr. Gagon that was not a correct answer, is that right?

A. No, I am not sure that I borrowed it from Mr. Gagon. I did use the truck.

Q. You used the truck one other time?

A. Yes.

Q. And you don't know from whom you got it, do you? A. No, I don't remember.

Q. Then you didn't intend to answer the question that you borrowed it from Mr. Gagon the other time, is that right? A. That is right.

Q. On this day that you got the truck, the day of the accident, you attempted to borrow other trucks, or another truck before contacting Mrs. Gagon?

Mr. Merrill: We will object to that upon the ground immaterial.

A. I did go to Mr. Corbett's house but he wasn't home.

(Deposition of M. Burke Horsley.)

Q. Then after that you called Mrs. Gagon?

A. Yes.

Q. Did you attempt to find Mr. Gagon that day?

A. Yes.

Q. And you were unable to do so?

A. He was out of town.

Q. When did you go to work for Mr. Elle? [8]

A. Approximately the first of August.

Q. And that was on a particular job, only?

A. Yes.

Q. And that job was what?

A. Curb and gutter.

Q. Where? A. Grace.

Q. Grace, Idaho. Was there any arrangement between you and Mr. Gagon while you were working for Mr. Elle to borrow his truck?

A. No, there was no direct understanding.

Q. You had used Mr. Gagon's trucks several times before, had you not?

A. Yes, I had used it previously.

Q. Under what circumstances was it?

A. In my own business to deliver merchandise.

Q. Purchased from whom? A. Gagon.

Q. And that was part of the understanding it was to be delivered?

A. To deliver merchandise, yes.

Q. On those occasions what would happen?

Mr. Merrill: Object to as immaterial.

A. Well, didn't have a delivery man and we needed material and had to load it and unload it.

(Deposition of M. Burke Horsley.)

Q. (By Judge Baum, resuming): And you would take his truck? A. Yes.

Q. And that is the only time you used Mr. Gagon's truck in getting material you purchased from him? A. Yes.

Q. Did Gagon have that same arrangement with other customers, do you know?

A. Well, I think so.

Q. You mentioned something about using a concrete mixer; was that on another job for yourself?

A. My own job, yes.

Q. It had nothing to do with this Grace job?

A. No.

Q. Did you on the day of the accident attempt to locate William Gagon first before you contacted Mrs. Gagon? A. Yes, I looked for Mr. Gagon.

Q. And you found he was where?

A. I understood that he was fishing; he was out of town.

Q. And it was after that then that you attempted to contact Mr. Corbett that you consulted with Mrs. Gagon? A. Yes, sir.

Judge Baum: That is all. [10]

Redirect Examination

Q. (By Mr. Merrill): Did you talk with Mr. Corbett before you tried to find Mr. Gagon?

A. I looked for Mr. Gagon first as I remember—it has been a long time ago. I think I looked for Mr. Gagon first and I was informed that he was out of town fishing and I think I drove up

(Deposition of M. Burke Horsley.)

to Mr. Corbett's home and he was out of town and then I called Mrs. Gagon.

Q. And it was from Mrs. Gagon that you got permission to use the truck? A. Yes, sir.

Mr. Merrill: That is all.

Judge Baum: That is all.

(Witness excused.) [11]

Judge Baum: It is stipulated between counsel that the present action was filed prior to the filing of the answer of the C. H. Elle Construction Company in the suit entitled Mary Lou Campbell, and others, versus the C. H. Elle Construction Company and William S. Gagon, and that the suit was originally entitled C. H. Elle Construction Company, a corporation, versus Western Casualty and Surety Company, and it was filed on September 19th, 1955, and that the trial of the action entitled Mary Lou Campbell, and others, versus C. H. Elle Construction Company was in December, 1955.

Mr. Merrill: Yes.

Judge Baum: We will call Mr. C. H. Elle.

C. H. ELLE

of the City of Pocatello, county of Bannock, and State of Idaho, a witness called on behalf of the defendant herein, being duly cautioned and sworn to testify the whole truth, and being carefully examined, deposes and says as follows:

Q. (By Judge Baum): Your name, please?

A. C. H. Elle.

(Deposition of C. H. Elle.)

Q. What connection have you with the C. H. Elle Construction Company?

A. I am the President.

Q. And were you President of that construction company during the year 1955? [12] A. Yes.

Q. You are acquainted with Mr. Burke Horsley? A. Yes.

Q. You and he were connected in having a job at Grace, Idaho? A. Yes, sir.

Q. Do you recall the suit of Mary Lou Campbell, and others, versus C. H. Elle Construction Company and M. Burke Horsley and other parties?

A. Yes, sir.

Q. Do you recall of a suit being filed in September, 1955, entitled C. H. Elle Construction Company, a corporation, versus Western Casualty and Surety Company, or did you know anything about it?

A. I didn't know C. H. Elle Construction Company.

Q. If it is a fact, Mr. Elle, that in September, 1955, a suit was filed in the United States District Court, for the District of Idaho, Eastern Division, entitled C. H. Elle Construction Company, a corporation, versus Western Casualty and Surety Company, did you know anything about that at the time of its filing?

A. No, I don't think that the Elle Company alone. I don't think the Elle Company alone was suing.

Q. If it is a fact that the C. H. Elle Construc-

(Deposition of C. H. Elle.)

tion Company was the only plaintiff, and the Western Casualty [13] and Surety Company was the defendant, and that the suit was filed in September, 1955, did you know anything about that suit?

A. I don't know that it was filed that way.

Q. Well, if it was filed that way did you know anything about it?

A. ——(No answer.)

Judge Baum: Well, we just stipulated it was filed that way, Mr. Elle.

Q. Did you have any understanding with W. S. Gagon, did you on behalf of the C. H. Elle Construction Company have any understanding with W. S. Gagon as to the use of any of his equipment in the Grace job? A. No.

Judge Baum: That is all.

Further Examination

Q. (By Mr. Merrill): Mr. Elle, have you or had you in the past borrowed from Mr. Gagon when you had jobs in that area?

A. I believe that we made one or two small rentals from him, yes. I think our records show that.

Q. Now, Mr. Elle, did you know of the filing, or was the filing of a suit against the Western Casualty and Surety Company discussed with you at any time? A. Yes. [14]

Q. By whom? A. By you.

Q. And that was prior to the time the suit was filed? A. Yes.

(Deposition of C. H. Elle.)

Q. You and I discussed the grounds, what it was going to be about and you knew that it was to be filed?

A. Well, I understood the insurance company was to file the suit.

Q. And that the C. H. Elle Construction Company was going to be involved?

A. The insurance company, through the insurance company.

Q. And who is the insurance company?

A. I understand St. Paul-Mercury was at that time.

Q. So that you were advised of the filing of this suit? A. We discussed it.

Q. And it was satisfactory to you, you gave your permission?

A. The insurance company do the suing.

Q. And the questions involved in this suit were discussed with you? A. Yes.

Q. And you understood what the suit was to be about? A. Yes.

Mr. Merrill: Thank you. That is all. [15]

Further Examination

Q. (By Judge Baum): In other words, you understood that the St. Paul-Mercury Indemnity was going to bring the suit, is that it?

A. Yes, sir.

Q. And not the C. H. Elle Construction Company? A. Yes.

Q. You said that you had several small rentals,

(Deposition of C. H. Elle.)

that was when, now, when did those rentals happen with Gagon?

A. I believe probably about the time we built the school down there.

Q. And about how many years ago was that?

A. I wouldn't be sure whether it was 1951 and 1952, or 1952 and 1953.

Q. And those items consisted of the rental of some buckets, didn't it? A. Yes.

Q. And consisted of $1.25 for each item, didn't it? A. Yes.

Q. And that is the only equipment that you had rented from him?

A. Yes, so far as I know.

Q. Well, you checked your records, did you not?

A. Yes. [16]

Q. And Mr. Merrill was out with your secretary and checked your records of your company?

A. Yes.

Judge Baum: That is all.

Mr. Merrill: That is all.

Judge Baum: That is all, Mr. Elle, thank you, sir.

(Witness excused.) [17]

Certificate of Notary Attached.

[Endorsed]: Filed December 18, 1956.

[Title of District Court and Cause.]

STIPULATION

It is Hereby Stipulated and Agreed by and between the parties in the above entitled matter, through their counsel of record, as follows:

I.

That the following listed documents are genuine, that their identification is admitted and that there is no objection on the grounds of their identification to the same being admitted as Exhibits in this action, reserving, however, the right of objection on all other grounds, said objections, if any, to be made in the Briefs of the respective parties to be hereinafter filed:

(a) The document attached hereto and marked Exhibit "A," designated as Second Amended Complaint in the case of Mary Lou Campbell, et al., vs. C. H. Elle Construction Company, et al.

(b) The document attached hereto and marked Exhibit "B," designated as Answer of William S. Gagon in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(c) The document attached hereto and marked Exhibit "C," designated as Answer of C. H. Elle Construction Company in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company.

(c-1) The document attached hereto and marked Exhibit "C-1," designated as Answer of M. Burke

Horsley in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(d) The instrument attached hereto and marked Exhibit "d," designated as Verdict in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(e) The instrument attached hereto and marked Exhibit "E," designated as Judgment on Verdict in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(f) The instrument attached hereto and marked Exhibit "F," designated as "Order," which in truth and in fact is a Judgment signed by Henry McQuade, District Judge, granting judgment in favor of William F. Gagon in the case of Mary Lou Campbell et al., v. C. H. Elle Construction Company, et al.

(g) The instrument attached hereto and marked Exhibit "G," designated as Satisfaction of Judgment in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al.

(h) The two insurance policies, one issued by the St. Paul-Mercury Indemnity Company, being Policy 6210145, together with riders and endorsements; also Standard Combined Automobile Insurance Policy, U. I. 518973, issued by the defendant herein to William S. Gagon, Soda Springs, Idaho; or copies of the respective insurance policies; such policies handed to the Court with this Stipulation and being copies of the policies issued by the respective companies.

II.

That the instrument designated as S.R. 21, a copy of which has heretofore been attached to Plaintiffs' Additional Request for Admission, is a copy of the instrument on file with the Commissioner of Law Enforcement, State of Idaho, and there is no objection on the grounds of its identification to the same being admitted as an Exhibit in this action, all other objections however, are reserved by the defendant and will be set forth in its brief.

III.

The following is admitted:

(a) That the judgment in the case of Mary Lou Campbell, et al., v. C. H. Elle Construction Company, et al., was paid by the St. Paul-Mercury Indemnity Company on behalf of the C. H. Elle Construction Company, all in accordance with the allegations of paragraph XII of Plaintiffs' Amended and Supplemental Complaint.

(b) Payment of costs advanced and attorney's fees to Merrill & Merrill, Attorneys at Law, Pocatello, Idaho, who acted as the attorneys for the C. H. Elle Construction Company and M. Burke Horsley and Max Larsen, in the case of Mary Lou Campbell et al. v. C. H. Elle Construction Company, the amounts paid being $1500.00 for attorneys' fees and $139.53 for costs advanced, per attached statement.

IV.

It Is Further Stipulated that there be admitted in evidence all Requests for Admissions and Replies

to Requests for Admissions heretofore filed by the respective parties herein, reserving, however, all rights to objection to the evidence contained therein, which said objections, if any, are to be made in the briefs of the respective parties to be hereinafter filed.

V.

It Is Further Stipulated that each of the parties hereto reserves a right to urge in briefs all motions filed to said pleadings.

VI.

That the Depositions heretofore taken of Jessie Gagon, William S. Gagon and M. Burke Horsley and C. H. Elle be published and considered by the Court as evidence to the same extent as if said testimony was adduced during the trial, reserving the right, however, to object to evidence contained in said Depositions as to its relevancy, competency and materiality, said objections if any, to be made in the Briefs of the respective parties to be hereinafter filed.

VII.

That in the event the Court requests further and additional information, the same will be furnished by the parties by a stipulation or deposition.

VIII.

That the above entitled cause be herewith submitted to the Court for decision upon the files, record, this Stipulation, and the Depositions noted in Paragraph VI above.

Dated this 7th day of January, 1957.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.
/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
/s/ BEN PETERSON,
Attorneys for Defendant.

EXHIBIT "A"

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock

MARY LOU CAMPBELL, and TERRILL RAY CAMPBELL and CURTIS HOWARD CAMPBELL, Minors, by their Guardian Ad Litem, MARY LOU CAMPBELL,

Plaintiffs,

vs.

C. H. ELLE CONSTRUCTION CO., a corporation, M. BURKE HORSLEY, MAX LARSEN, and W. S. GAGON, Defendants.

SECOND AMENDED COMPLAINT

The plaintiffs complain and for cause of action against defendants, allege:

I.

That the plaintiff, Terrill Ray Campbell, is a minor of the age of six years; that Curtis Howard

Exhibit "A"—(Continued)

Campbell is a minor of the age of two years; that on February 28, 1955, Mary Lou Campbell was duly appointed Guardian Ad Litem of said Minor children.

II.

That at all times herein mentioned, Plaintiff Mary Lou Campbell and Arnold Campbell, now deceased, were husband and wife; that Mary Lou Campbell is the surviving widow of Arnold Campbell, deceased, and that Terrell Ray Campbell and Curtis Howard Campbell are the sole surviving children of the marriage of Mary Lou Campbell and Arnold Campbell, deceased, that said plaintiffs are the sole surviving heirs of Arnold Campbell.

III.

That the Defendant, C. H. Elle Construction Company is an Idaho corporation with principal place of business at Pocatello, Idaho.

IV.

That at all times mentioned herein, defendant, William S. Gagon, was the owner of a 1954 Chevrolet truck, bearing 1954 Idaho license, 3C-1010; that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon.

V.

That defendants, M. Burke Horsley and Max Larsen were residents of the State of Idaho, and on

Exhibit "A"—(Continued)

the 22nd day of August, 1954, were engaged as agents, servants or employees of the C. H. Elle Construction Company, and were at all times herein mentioned acting as such within the course and scope of their employment, in and were conveying on said truck a certain Scoopmobile, the property of defendant, C. H. Elle Construction Co. for use on a street and improvement contract then being carried out by said company.

VI.

That on the 22nd day of August, 1954, at approximately 7:35 p.m. and when it was dark, the defendant, M. Burke Horsley was driving and Max Larsen was riding, giving suggestions and directions and participating in the operation of the Chevrolet truck traveling in an easterly direction on U. S. Highway 30, North, at a point approximately 2½ miles west of Soda Springs, Caribou County, Idaho.

VII.

That at such time and place, the deceased Arnold Campbell was riding in and driving his automobile in a westerly direction on U. S. Highway 30, North, approximately 2½ miles west of Soda Springs, Idaho, in Caribou County. That at such time and place the Chevrolet truck was negligently operated in such fashion that the truck was caused to collide with the sedan in which Arnold Campbell was riding; that the injuries hereinafter set forth were caused solely and proximately by reason of the neg-

Exhibit "A"—(Continued)

ligence, carelessness and recklessness of the defendants and each of them in one or more of the following particulars:

a. In operating and permitting the operation of such truck, at 40 to 50 miles per hour, a speed greater than was reasonable and proper in view of the traffic, condition, surface and width of the road and particularly in view of the heavy scoopmobile then being carried by the truck at such time and place;

b. In operating and permitting the operation of the Chevrolet truck at such speed and in such manner as to endanger the life, limb and property of Arnold Campbell, deceased;

c. In driving or causing to be driven the said truck, or permitting it upon the left half of the highway;

d. In failing to give to the decedent, Arnold Campbell, at least one-half of the main traveled portion of the roadway as the vehicles approached from opposite directions;

e. In driving and permitting the operation of said truck at a time when it had been loaded by defendants Horsley and Larsen with a heavy scoopmobile which had not been firmly and properly secured in the bed of said truck.

That such negligence on the part of the defendants and each of them caused said truck to run into, collide with, and crush the automobile being driven by Arnold Campbell.

Exhibit "A"—(Continued)

VIII.

That by reason of such negligence of the defendants and each of them and as a direct and proximate result thereof, Arnold Campbell suffered a deep cut on the left eye below the bone, two broken ribs, dislocation of the left leg at the hips, crushed chest, a bruise of the head and other injuries which caused Arnold Campbell to die (illegible).

IX.

That directly and proximately by reason of carelessness and negligence of defendants and each of them, and as a direct and proximate result thereof, plaintiffs have been deprived of the companionship, support, society, aid and comfort of their husband and father, all to their further damage in the sum of $100,000.00.

Second Cause of Action

Plaintiffs replead all of the allegations contained in Paragraphs I through VIII of the First Cause of Action and refer to and incorporate the same in this cause of action as fully as though herein repleaded.

I.

That directly and proximately by reason of the carelessness, and negligence of the defendants and each of them, plaintiff, Mary Lou Campbell, has been further damaged in that Mary Lou Campbell was compelled to and did incur indebtedness in the sum of $780.00 for funeral and burial expenses of Arnold Campbell, and the further sum of $116.45

Exhibit "A"—(Continued)

for medical and hospital expenses in connection with the hospitalization and treatment of Arnold Campbell, following the accident, and prior to his death.

Third Cause of Action

Plaintiffs re-plead all of the allegations contained in Paragraphs I through VII of the First Cause of Action and refer to and incorporate the same in this cause of action as though they were again fully set forth herein.

I.

That by reason of the collision heretofore mentioned, the automobile belonging to the plaintiff, Mary Lou Campbell, and the deceased, Arnold Campbell, was so badly wrecked and damaged that it could not be restored or repaired; that the reasonable value of such automobile immediately prior to the collision was $1,750.00. That the reasonable value thereof immediately following the collision was $130.00; that directly and proximately as a result of the negligence and carelessness of the defendants as aforesaid, plaintiff, Mary Lou Campbell, has been further damaged in the sum of $1,620.00.

Wherefore, Plaintiffs pray judgment against the defendants and each of them as follows:

1. For the sum of $100,000.00 damages on the first cause of action.

2. For the sum of $896.45 on the second cause of action.

3. For the further sum of $1,620.00 on the third cause of action.

Exhibit "A"—(Continued)

4. For costs of suit.

55. For all other and further relief as to the court may seem just and proper and for all general relief.

GEE & HARGRAVES,
/s/ By MERRILL K. GEE,
Attorneys for Plaintiffs.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Second Amended Complaint Filed August 16, 1955.

EXHIBIT "B"

[Title of District Court and Cause No. 18915.]

ANSWER OF DEFENDANT, W. S. GAGON

Comes now the defendant, W. S. Gagon, and as and for his answer to the second amended complaint of the said plaintiffs, alleges, affirms, admits and denies as follows:

I.

Defendant denies each and every allegation in said Second Amended Complaint contained, save and except those allegations hereinafter specifically admitted or modified.

II.

Answering paragraph I of said second amended complaint your answering defendant admits that on February 28, 1955, Mary Lou Campbell was duly appointed guardian ad litem, but states that he has not sufficient information in reference to the

Exhibit "B"—(Continued)

other allegations in said paragraph upon which to base an affirmation or denial and therefore denies the same.

III.

Answering paragraph II of said second amended complaint your answering defendant states that he has not sufficient information upon which to base an affirmation or denial upon the matters therein contained and therefore denies the same.

IV.

Answering paragraph III of said second amended complaint your answering defendant admits the same.

V.

Answering paragraph IV of said second amended complaint your answering defendant admits that he was the owner of a 1954 Chevrolet truck, bearing license 3C-1010, but denies the remaining part of said paragraph, to wit, the following:

> "that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon."

VI.

Answering paragraph V of said second amended complaint your answering defendant states that he has not sufficient information upon which to base an affirmation or denial of the same and therefore denies the allegations therein contained.

Exhibit "B"—(Continued)

VII.

Answering paragraph VI of said second amended complaint your answering defendant denies each and every allegation therein contained but states that he has been advised that M. Burke Horsley was, on the 22nd day of August, 1954, driving the Chevrolet truck referred to in said paragraph.

VIII.

Answering paragraph VII of said second amended complaint your answering defendant denies each and every allegation therein contained.

IX.

Answering paragraph VIII of said second amended complaint your answering defendant denies each and every allegation therein contained but states that the said Arnold Campbell received an injury in an automobile accident but as to the extent of said injury your answering defendant has not sufficient information upon which to base an affirmation or denial and therefore denies the same.

X.

Answering paragraph IX of said second amended complaint your answering defendant denies each and every allegation therein contained.

Answer to Second Cause of Action

Plaintiffs having adopted paragraphs I through VIII of their first cause of action as paragraphs I

Exhibit "B"—(Continued)

through VIII of their second cause of action, your answering defendant adopts paragraphs I through IX of his answer to plaintiffs' paragraphs I through VIII of their first cause of action as his answer to the adopted paragraphs I through VIII of plaintiffs' second cause of action, and further alleges:

X.

Answering paragraph I, so termed in the said second cause of action, your answering defendant states that he has no information upon which to base an affirmation or denial thereof and therefore denies the same.

Answer to Third Cause of Action

Plaintiffs having adopted paragraphs I through VII of their first cause of action as paragraphs I through VII of their third cause of action, your answering defendant adopts paragraphs I through VIII of his answer to plaintiffs' paragraphs I through VII of their first cause of action as his answer to the adopted paragraphs I through VII of plaintiffs' third cause of action and further alleges:

IX.

Answering paragraph I, so termed in the said third cause of action, your answering defendant denies the allegations therein contained.

First Affirmative Defense

Further answering said second amended complaint and as a first affirmative defense thereto your answering defendant states:

Exhibit "B"—(Continued)

I.

That the said Arnold Campbell, he being the husband of Mary Lou Campbell, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said Arnold Campbell in the premises, and the fault, carelessness and negligence of the said Arnold Campbell contributed to and caused whatever injuries the said Arnold Campbell received, and that such fault, negligence and carelessness of the said Arnold Campbell was and is imputed to the plaintiff, Mary Lou Campbell, she being the surviving spouse of said Arnold Campbell, deceased.

II.

That the said Arnold Campbell, he being the husband of Mary Lou Campbell, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said Arnold Campbell in the premises, and the fault, carelessness and negligence of the said Arnold Campbell were the sole causes of whatever injuries the said Arnold Campbell received, and that such fault, negligence and carelessness of the said Arnold Campbell was and is imputed to the plaintiff, Mary Lou Campbell, she

Exhibit "B"—(Continued)

being the surviving spouse of said Arnold Campbell, deceased.

Second Affirmative Defense

Further answering said second amended complaint and as a second affirmative defense thereto your answering defendant states:

I.

That the said Arnold Campbell, he being the deceased father of Terrell Ray Campbell and Curtis Howard Campbell, being minors, and being members of the household of Arnold Campbell and Mary Lou Campbell, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said Arnold Campbell in the premises, and the fault, carelessness and negligence of the said Arnold Campbell contributed to and caused whatever injuries the said Arnold Campbell received, and that such fault, negligence and carelessness of the said Arnold Campbell was and is imputed to the plaintiffs, Mary Lou Campbell, as guardian ad litem for Terrell Ray Campbell and Curtis Howard Campbell; and likewise is imputed to Curtis Howard Campbell and Terrell Ray Campbell, and each of them.

II.

That the said Arnold Campbell, he being the deceased father of Terrell Ray Campbell and Curtis

Exhibit "B"—(Continued)

Howard Campbell, being minors, and being members of the household of Arnold Campbell and Mary Lou Campbell, did not exercise ordinary care, caution or prudence in the premises to avoid said accident, and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness and negligence of the said Arnold Campbell in the premises, and the fault, carelessness and negligence of the said Arnold Campbell were the sole causes of whatever injuries the said Arnold Campbell received, and that such fault, negligence and carelessness of the said Arnold Campbell was and is imputed to the plaintiffs, Mary Lou Campbell, as guardian ad litem for Terrell Ray Campbell and Curtis Howard Campbell, and likewise is imputed to Mary Lou Campbell, Curtis Howard Campbell and Terrell Ray Campbell, and each of them.

Third Affirmative Defense

Further answering said second amended complaint and as a third affirmative defense thereto your answering defendant states:

I.

That he is the owner of the truck described in paragraph IV of said second amended complaint, and that he has no responsibility or liability whatever in the matter, but that in the event the court should find that there was some liability on his part by his being the owner of such truck, that such lia-

Exhibit "B"—(Continued)

bility could not exceed the sum of $5,000.00 insofar as the matters and things referred to in said first cause of action; and not to exceed the sum of $1,000.00 by reason of the matters and things set forth in the said third cause of action. That as heretofore stated, your answering defendant alleges that he is in nowise responsible, or was he in anywise negligent in the matter, and he again asserts that he has no liability and should be dismissed from such suit.

Wherefore, defendant having fully answered prays that he be dismissed with his costs and that plaintiffs take nothing by reason of their second amended complaint.

/s/ O. R. BAUM,
/s/ RUBY Y. BROWN,
/s/ ISAAC McDOUGAL,
Attorneys for the Defendant, W. S. Gagon.

Duly Verified.

[Endorsed]: Answer. Filed Oct. 1, 1955.

EXHIBIT "C"

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, C. H. ELLE CONSTRUCTION COMPANY

Comes now the defendant, C. H. Elle Construction Company, a corporation, and as its Answer to

Exhibit "C"—(Continued)

the Second Amended Complaint of the plaintiffs admits, denies and alleges as follows:

I.

Defendant, C. H. Elle Construction Company, denies each and every allegation in said Second Amended Complaint not hereinafter specifically admitted.

II.

Answering Paragraph I of said Second Amended Complaint, this answering defendant admits that on February 28, 1955, Mary Lou Campbell was duly appointed guardian ad litem, but states that it does not have any information or belief upon which to form an Answer and upon the ground denies each and every other allegation in said paragraph.

III.

Answering Paragraph II of said Second Amended Complaint, this answering defendant alleges that it has no information or belief to sufficiently form an Answer and upon this ground denies each and every allegation in said paragraph.

IV.

This defendant admits the allegations contained in Paragraph III of said Second Amended Complaint.

V.

Answering Paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a

Exhibit "C"—(Continued)

1954 Chevrolet truck bearing 1954 Idaho license plates 3C-1010, but denies each and every other allegation contained in said paragraph.

VI.

Answering Paragraph V of said Second Amended Complaint, this answering defendant admits that M. Burke Horsley was a resident of the State of Idaho on the 22nd day of August, 1954 and was engaged as agent and servant of this defendant and was conveying on a truck a certain scoopmobile, property of this defendant, but this answering defendant denies each and every other allegation contained in said paragraph.

VII.

Answering Paragraph VI of said Second Amended Complaint, this answering defendant admits that on the 22nd day of August, 1954, M. Burke Horsley was driving a Chevrolet truck East on U. S. Highway 30 at a point approximately 2½ miles West of Soda Springs, Idaho, but denies each and every other allegation contained in said paragraph.

VIII.

This answering defendant denies each and every allegation contained in Paragraph VII of said Second Amended Complaint.

IX.

Answering Paragraph VIII of said Second

Exhibit "C"—(Continued)

Amended Complaint, this answering defendant denies each and every allegation therein contained, but in this regard states that the said Arnold Campbell received injuries in an automobile accident, but that this answering defendant has no information or belief sufficient to form an Answer as to the extent of said injuries and upon that ground denies the same.

X.

This answering defendant denies the allegations contained in Paragraph IX of said Second Amended Complaint.

Answer to Second Cause of Action

Answering said Second Cause of Action, this answering defendant adopts Paragraph I through X of its Answer to Paragraph I through IX contained in plaintiffs' First Cause of Action as its Answer to the Paragraphs I through VIII of plaintiffs' First Cause of Action referred to and incorporated in said Second Cause of Action.

XI.

Answering the paragraph designated as I of said Second Cause of Action of said Second Amended Complaint, this answering defendant denies each and every allegation contained therein.

Answer to Third Cause of Action

Answering said Third Cause of Action, this answering defendant adopts Paragraph I through X of its Answer to Paragraph I through IX con-

Exhibit "C"—(Continued)

tained in plaintiffs' First Cause of Action as its Answer to the Paragraphs I through VIII of plaintiffs' First Cause of Action referred to and incorporated in said Third Cause of Action.

XI.

Answering the paragraph designated as I of said Third Cause of Action of said Second Amended Complaint, this answering defendant denies each and every allegation contained therein.

First Affirmative Defense

Further answering said Second Amended Complaint and as a first affirmative defense to all counts therein, this answering defendant alleges that at the time and place alleged in said Second Amended Complaint the said Arnold Campbell drove and operated his automobile in a negligent and careless manner and without ordinary caution or prudence to avoid said accident and the resulting injuries, if any, complained, were directly and proximately caused by the carelessness and negligence of the said Arnold Campbell which said carelessness and negligence is imputed to the plaintiff, Mary Lou Campbell, she being the surviving spouse of Arnold Campbell and this answering defendant relies upon the negligence of Arnold Campbell as a defense hereto.

Second Affirmative Defense

Further answering said Second Amended Complaint and as a second affirmative defense to all

Exhibit "C"—(Continued)

counts therein, this answering defendant alleges that at the time and place alleged in said Second Amended Complaint the said Arnold Campbell drove and operated his automobile in a negligent and careless manner and without ordinary caution or prudence to avoid said accident, and the resulting injuries, if any, complained of, were directly and proximately caused by the carelessness and negligence of the said Arnold Campbell which said carelessness and negligence is imputed to the said Terrell Ray Campbell and Curtis Howard Campbell, minors, they being the surviving children of the said Arnold Campbell, and this defendant relies upon the said negligence of Arnold Campbell as a defense herein.

Wherefore, this answering defendant having fully answered said Second Amended Complaint, prays that it be dismissed with its costs and that plaintiffs take nothing by reason of their Second Amended Complaint.

MERRILL & MERRILL,

/s/ By W. F. MERRILL,

Attorneys for defendant, C. H. Elle Construction Company.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Answer. Filed Oct. 3, 1955.

EXHIBIT "C-1"

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, M. BURKE HORSLEY

Comes now the defendant, M. Burke Horsley, and as his Answer to the Second Amended Complaint of the plaintiffs admits, denies and alleges as follows:

I.

Defendant, M. Burke Horsley, denies each and every allegation in said Second Amended Complaint not hereinafter specifically admitted.

II.

Answering Paragraph I of said Second Amended Complaint, this answering defendant admits that on February 28, 1955, Mary Lou Campbell was duly appointed guardian ad litem, but states that he does not have any information or belief upon which to form an Answer and upon the ground denies each and every other allegation in said paragraph.

III.

Answering Paragraph II of said Second Amended Complaint this answering defendant alleges that he has no information or belief to sufficiently form an Answer and upon this ground denies each and every allegation in said paragraph.

IV.

This defendant admits the allegations contained

Exhibit "C-1"—(Continued)

in Paragraph III of said Second Amended Complaint.

V.

Answering Paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a 1954 Chevrolet truck bearing 1954 Idaho license plates 3C-1010, but denies each and every other allegation contained in said paragraph.

VI.

Answering Paragraph V of said Second Amended Complaint, this answering defendant admits that he was a resident of the state of Idaho and on the 22nd day of August, 1954, was acting as agent and servant of C. H. Elle Construction Company and was conveying a certain scoopmobile, the property of C. H. Elle Construction Company, but denies each and every other allegation contained in said paragraph.

VII.

Answering Paragraph VI of said Second Amended Complaint, this answering defendant admits that on the 22nd day of August, 1954, he was driving a Chevrolet truck traveling in an Easterly direction on U. S. Highway 30 North at a point approximately 2½ miles West of Soda Springs, Idaho, but denies each and every other allegation contained in said paragraph.

VIII.

This answering defendant denies each and every

Exhibit "C-1"—(Continued)

allegation contained in Paragraph VII of said Second Amended Complaint.

IX.

Answering Paragraph VIII of said Second Amended Complaint, this answering defendant denies each and every allegation therein contained, but in this regard states that the said Arnold Campbell received injuries in an automobile accident, but that this answering defendant has no information or belief sufficient to form an Answer as to the extent of said injuries and upon that ground denies the same.

X.

This answering defendant denies the allegations contained in Paragraph IX of said Second Amended Complaint.

Answer to Second Cause of Action

Answering said Second Cause of Action, this answering defendant adopts Paragraphs I through X of his Answer to Paragraphs I through IX contained in Plaintiffs' First Cause of Action as his answer to the Paragraphs I through VIII of plaintiffs' First Cause of Action referred to and incorporated in said Second Cause of Action.

XI.

Answering the paragraph designated as I of said Second Cause of Action of said Second Amended Complaint, this answering defendant denies each and every allegation contained therein.

Exhibit "C-1"—(Continued)

Answer to Third Cause of Action

Answering said Third Cause of Action, this answering defendant adopts Paragraphs I through X of his Answer to Paragraphs 1 through IX contained in plaintiffs' First Cause of Action as his Answer to the Paragraphs I through VIII of plaintiffs' First Cause of Action referred to and incorporated in said Third Cause of Action.

XI.

Answering the paragraph designated as I of said Third Cause of Action of said Second Amended Complaint, this answering defendant denies each and every allegation contained therein.

First Affirmative Defense

Further answering said Second Amended Complaint and as a first affirmative defense to all counts therein, this answering defendant alleges that at the time and place alleged in said Second Amended Complaint the said Arnold Campbell drove and operated his automobile in a negligent and careless manner and without ordinary caution or prudence to avoid said accident and the resulting injuries, if any, complained of, were directly and proximately caused by the carelessness and negligence of the said Arnold Campbell which said carelessness and negligence is imputed to the plaintiff, Mary Lou Campbell, she being the surviving spouse of Arnold Campbell and this answering defendant relies upon the negligence of Arnold Campbell as a defense hereto.

Exhibit "C-1"—(Continued)

Second Affirmative Defense

Further answering said Second Amended Complaint and as a second affirmative defense to all counts therein, this answering defendant alleges that at the time and place alleged in said Second Amended Complaint the said Arnold Campbell drove and operated his automobile in a negligent and careless manner and without ordinary caution or prudence to avoid said accident, and the resulting injuries, if any, complained of, were directly and proximately caused by the carelessness and negligence of said Arnold Campbell which said carelessness and negligence is imputed to the said Terrell Ray Campbell and Curtis Howard Campbell, minors, they being the surviving children of the said Arnold Campbell, and this defendant relies upon the said negligence of Arnold Campbell as a defense herein.

Wherefore, this answering defendant having fully answered said Second Amended Complaint, prays that he be dismissed with his costs and that plaintiffs take nothing by reason of their Second Amended Complaint.

MERRILL & MERRILL,
/s/ By WESLEY F. MERRILL,
Attorneys for defendant,
M. Burke Horsley.

Duly Verified.

Acknowledgment of Service Attached.

EXHIBIT "D"

[Title of District Court and Cause No. 18915.]

VERDICT

We, the Jury in the above entitled cause, find for the plaintiffs and against the defendants, C. H. Elle Construction Company, a corporation, and M. Burke Horsley, and assess plaintiffs' damages in the sum of $15,000.

/s/ HENRY HALES,
Foreman.

[Endorsed]: Verdict. Filed Dec. 23, 1955.

EXHIBIT "E"

In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock

No. 18915

MARY LOU CAMPBELL, and TERRELL RAY CAMPBELL, and HOWARD CAMPBELL, Minors, by their Guardian Ad Litem, MARY LOU CAMPBELL, Plaintiffs,

vs.

C. H. ELLE CONSTRUCTION COMPANY, a corporation, M. BURKE HORSLEY and W. S. GAGON, Defendants.

JUDGMENT ON VERDICT

This Cause came on regularly for trial. The said parties appeared by their attorneys. A jury of

Exhibit "E"—(Continued)

twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of Plaintiff and Defendant were sworn and examined. After hearing evidence, the argument of Counsel and instructions of the Court, the Jury retired to consider their verdict, and subsequently returned into Court, and being called, answered to their names and say they find a verdict for the Plaintiffs and against the defendants, C. H. Elle Construction Company, a corporation, and M. Burke Horsley, and assess plaintiffs' damages in the sum of $15,-000.00.—Henry Hales, Foreman.

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said Plaintiffs, Mary Lou Campbell and Terrell Ray Campbell, and Howard Campbell, minors, by their Guardian Ad Litem Mary Lou Campbell have and recover from said Defendants, C. H. Elle Construction Company, a corporation, and M. Burke Horsley the sum of Fifteen Thousand and No/100 ($15,000.00) Dollars, with interest thereon at the rate of 6 per cent per annum from the date hereof until paid, together with said costs and disbursement incurred in this action, amounting to the sum of Three Hundred Seventy-one and 40/100 ($371.40) Dollars.

Judgment rendered December 24th, A.D. 1955.

/s/ SARAH DEVANEY,

Clerk of the District Court.

[Endorsed]: Judgment. Filed Dec. 24, 1955.

[Note: Exhibit F "Order" is the same as set out at pages 40-41.]

EXHIBIT "G"

[Title of District Court and Cause.]

SATISFACTION OF JUDGMENT

For and in Consideration of the sum of Fifteen Thousand Three Hundred and Seventy One and 40/100 Dollars ($15,371.40) cash, lawful money of the United States, and the further consideration of the defendants, C. H. Elle Construction Company, a corporation, and M. Burke Horsley waiving their legal right to appeal said cause to the Supreme Court of the State of Idaho, and other valuable consideration, paid by and on behalf of the defendants C. H. Elle Construction Company, a corporation, and M. Burke Horsley, the receipt of all of which is hereby acknowledged, the undersigned, Mary Lou Campbell and Mary Lou Campbell, Guardian Ad Litem of Terrell Ray Campbell and Curtis Howard Campbell, Minors, and their attorneys of record, hereby acknowledge full and complete satisfaction and discharge of that certain judgment made and entered in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, on the 23rd day of December, 1955 in favor of the above named plaintiffs and against the defendants C. H. Elle Construction Company, a corporation, and M. Burke Horsley, which said judgment is recorded in Book 20 of Judgments at Page 98, of the records

Exhibit "G"—(Continued)

of Bannock County, State of Idaho, and that said judgment shall hereafter be held for naught, and that the payment received by the undersigned shall operate as a full payment and settlement of said judgment, including principal, interest, and costs.

That the Clerk of the above entitled Court is hereby authorized and directed to enter full and complete satisfaction of record, and discharge said judgment and the whole thereof.

Dated this 18th day of April, 1956.

/s/ MARY LOU CAMPBELL,
/s/ MARY LOU CAMPBELL,
Guardian Ad Litem of Terrell Ray Campbell and Curtis Howard Campbell, Minors.

GEE & HARGRAVES,
/s/ By MERRILL K. GEE,
Attorneys of Record of the above named parties.

Duly Verified.

[Endorsed]: Satisfaction of Judgment. Filed June 13, 1956.

Pocatello, Idaho, January 6, 1956

St. Paul-Mercury Indemnity Company
200 Mills Building
San Francisco 6, California

Attention: Mr. J. B. Wallace

In Account With
MERRILL & MERRILL
Attorneys at Law
Pocatello, Idaho

Re: Campbell v. C. H. Elle Construction Co. et al.

Costs Advanced:

Filing appearances for C. H. Elle, M. Burke Horsley and Max Larson. .$	15.00
Long Distance Telephone Calls:	
12-13-55 Soda Springs	.83
12-13-55 San Francisco	3.03
12-14-55 Soda Springs	1.43
12-14-55 Montpelier	.99
12-22-55 Montpelier	.17
12-30-55 San Francisco	6.45
Telegram to San Francisco.........	1.43
Witness Fees:	
Mark Wilson, travel 200 miles 4 days at trial	62.00
William Meccico, travel 75 miles 3 days at trial	27.75
Henry Parker, travel 1 mile, 3 days at trial	9.25
Travel to Soda Springs............	11.20

assumed under contract) 1. Bodily Injury to or sickness, disease or death of any employee of the named Insured while engaged in the employment of the Insured, other than domestic employees with respect to the operation, maintenance, or repair of an automobile."

At the time of the accident, August 22, 1954, both of these policies were in full force and effect. On that date, M. Burke Horsley, an employee of Elle Construction Company, one of the Plaintiffs herein, went to the home of Wm. S. Gagon, the named Insured under the Western policy, and made arrangements with Gagon's wife, Jessie, to "borrow" the 1954 Chevrolet truck covered by the policy.

While driving this truck, Horsley was involved in an accident in which a third-party, Arnold Campbell, sustained injuries as a result of which he died. It is not necessary to go into the facts of that accident as Horsley was found to have been negligent in the trial of the case of Mary Lou Campbell and others vs. Elle Construction Company, Horsley and Gagon, in the Fifth Judicial District of the State of Idaho, in and for Bannock County. Elle Construction Company was held liable under the doctrine of respondeat superior for Horsley's negligent acts committed within the scope of his employment. The Judgment in favor of Mrs. Campbell was paid by St. Paul-Mercury as Elle Construction Company's insurer, one of the plaintiffs herein.

It should be further noted that Wm. S. Gagon, who was made a party defendant by virtue of the Idaho statutes, was absolved of negligence, the jury

in the state court action bringing in a verdict in favor of Mr. Gagon and against the plaintiffs therein.

This suit was then instituted by St. Paul-Mercury, Elle's insurer, against Western, insurer of the truck owned by Gagon, to recover the amount paid under the judgment in favor of Mary Lou Campbell et al.

The matter has been presented to the Court on stipulation of counsel, which stipulation recites that the cause be submitted to the Court for decision upon the files, the records, the Stipulation and the depositions noted and on file herein. Counsel then presented their written briefs and arguments.

Several questions are presented for the Court's determination, and are as follows:

First, was Horsley using the vehicle with the permission of the named insured, thereby making him an insured under the Western policy, or as to this issue does the doctrine of collateral estoppel apply?

Second, does the coverage of the policy written by Western extend to the use to which the truck was put as set forth above, where its policy was designated as a commercial policy as defined therein.

Third, does the filing of an S.R. 21, under the laws of the State of Idaho, by an insurance company's agent, determine the liability of that insurance company?

Fourth, should the Court determine that the policies written by both companies provide coverage, which company has primary liability and which has secondary?

There are other questions incidental to these, and the Court sets these forth merely as the main issues involved.

The first question, as outlined above, must necessarily be determined at the outset, for if Horsley was not an insured under the policy, then Elle Construction Company was not an insured and there would be no liability on the part of Western.

It is the opinion of this Court that the verdict in the State Court action by which the jury found in favor of the insured Gagon, is conclusive as to the issue of whether Horsley was driving the vehicle with the owner's permission. By their verdict they found that he was not. That finding is conclusive on that issue and in that regard this Court need go no farther. New York Casualty Co. et al. vs. Superior Court in and for City and County of San Francisco, 85 P. 2d 965; Maryland Casualty Co. vs. Lopopolo, 97 F. 2d 554.

The Court has fully considered all of the questions presented in this matter. However, under the decision of the Court a determination of the remaining questions becomes unnecessary and immaterial.

Counsel for Defendant, Western Casualty and Surety Company, may prepare Findings, Conclusions and Judgment, submitting original to the Court and serving a copy on opposing counsel.

[Endorsed]: Filed Sept. 25, 1957.

[Title of District Court and Cause.]

EXCEPTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the plaintiffs and except to the Proposed Findings of Fact and Conclusions of Law heretofore submitted by the defendant and further submit herewith Proposed Amendments to Findings of Fact and Conclusions of Law.

Findings of Fact

I.

Plaintiffs except to the Findings of Fact No. II upon the grounds and for the reason that the same is incomplete. Plaintiffs propose said Paragraph II but amended to add to said paragraph II the following:

"Said policy last referred to also contains the following provision:

'Other Insurance—No Insuring Agreement hereof shall apply to any loss if the Insured is, or would be but for the existence of such Insuring Agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any other such policy or policies, bond or bonds, had such Insuring Agreement not been effective.' "

II.

Plaintiffs except to Proposed Findings of Fact

No. III on the grounds that the same is inaccurate, not supported by the evidence and incomplete. Plaintiffs propose said Paragraph III be amended to read as follows:

"On August 22, 1954, the date of the accident, both of the aforementioned policies were in full force and effect. On that date, M. Burke Horsley, an employee of Elle Construction Company, one of the plaintiffs herein, made arrangements to borrow the 1954 Chevrolet truck owned by William J. Gagon and Jessie Gagon, husband and wife, by requesting the use of said truck from Jessie Gagon; that the said M. Burke Horsley went to the Gagon Company, a lumber yard, and received the keys to said truck from Jessie Gagon; that after the date of the accident, the said Gagon Lumber Company submitted a bill to Elle Construction Company in the amount of $15 for the use of said truck, which was paid; that after said accident, the Western Casualty and Surety Company, by and through its duly authorized agency, filed with the State of Idaho a certain document designated as SR-21, which said document, under oath, recited that the policy of the Western Casualty and Surety Company, Fort Scott, Kansas, applied to the operator of the vehicle, W. Burke Horsley, Soda Springs, Idaho."

III.

Plaintiffs except to Proposed Findings of Fact No. V on the grounds that the same is inaccurate, not supported by the evidence and incomplete. Plaintiffs propose said paragraph be amended as follows:

"William S. Gagon, who was a defendant in the action of Campbell, et al, v. Elle Construction Company, Horsley, and Gagon, in the State Court of the State of Idaho, having been made a defendant by virtue of the provisions of Section 49-1004, Idaho Code, the imputed negligence statute, secured a verdict in his favor in the said State Court action."

IV.

Plaintiffs proposed that said Findings of Fact be amended to add paragraph No. VII as follows:

"That the plaintiffs herein paid the Judgment in the State Court of the State of Idaho and the defendant is required to indemnify said plaintiffs in the amount of $13,630.93 plus interest."

Conclusions of Law

Plaintiffs except to the proposed Conclusions of Law on the grounds that the same are erroneous, not supported by the evidence, and against the law. Plaintiffs propose Conclusions of Law as follows:

I.

M. Burke Horsley, an employee of the plaintiff, Elle Construction Company, was using the vehicle of William S. Gagon, with permission, under the terms of that certain insurance policy issued by Western Casualty and Surety Company, in favor of William S. Gagon, insured.

II.

That the said Elle Construction Company was an organization legally responsible for the use of the vehicle within the terms of that certain insur-

ance policy issued by the Western Casualty and Surety Company in favor of William S. Gagon, insured.

III.

That under the terms of the above described insurance policy, the said M. Burke Horsley and Elle Construction Company became also insured, and said insurance coverage became the primary insurance coverage up to the limits of said policy.

IV.

That the use of the vehicle by M. Burke Horsley was within the coverage of the policy written by Western Casualty and Surety Company.

V.

That the plaintiffs herein, having paid the Judgment in the action in the State Court of the State of Idaho, are entitled to be indemnified in the amount of $13,630.93 plus interest and costs of this action.

Let Judgment enter.

Respectfully submitted,

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Jan. 4, 1958.

[Title of District Court and Cause.]

ORDER

The Defendant, Western Casualty and Surety Company, prepared and submitted proposed Findings of Fact and Conclusions of Law as directed by the Court, and the Plaintiffs thereafter filed their objections and proposed amendments thereto, and

The Court, having fully considered the same, does

Hereby Order That the proposed Amendments and Objections to Findings of Fact and Conclusions of Law be, and the same are hereby, overruled.

Findings of Fact, Conclusions of Law, and Judgment will be filed as proposed as of this date.

Dated January 31, 1958.

/s/ CHASE A. CLARK,
Chief Judge, U. S. District
Court, District of Idaho.

[Endorsed]: Filed January 31, 1958.

In The United States District Court for the District of Idaho, Eastern Division

No. 1916

C. H. ELLE CONSTRUCTION CO., a corporation, and ST. PAUL-MERCURY INDEMNITY CO., a corporation, Plaintiffs,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation, Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Findings of Fact

I.

Prior to the accident which gave rise to this controversy, Western Casualty and Surety Company (hereinafter referred to as Western), defendant herein, issued its Standard Combined Automobile Policy to Wm. S. Gagon, as named insured, covering the truck involved. In that policy the occupation of the named insured is designated as "Lumber Business, builder, hardware dealer, self, Soda Springs." Such policy further provided that the automobile described therein is to be used as "Commercial Class 5CA." Said policy further provided: "The term 'commercial' is defined as use principally in the business occupation of the named insured as stated in Item 1, including occasional

use for personal, pleasure, family and other business purposes."

II.

The Western Casualty policy further provided with respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured", includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission.

The plaintiff, St. Paul-Mercury and Indemnity Company, (hereinafter referred to as St. Paul-Mercury), had issued its multiple coverage policy to C. H. Elle Construction Company. Section A of that policy provides:

"Bodily Injury Liability (Including Automobile). The Company agrees to pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law or contract for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons."

Said policy last referred to also contains the following provisions:

"This Insuring Agreement does not apply * * * under Section A (except with respect to liability assumed under contract) 1. Bodily Injury to or sickness, disease or death of any employee of the

named Insured while engaged in the employment of the Insured, other than domestic employees with respect to the operation, maintenance, or repair of an automobile."

III.

On August 22, 1954, the date of the accident, both of the aforementioned policies were in full force and effect. On that date M. Burke Horsley, an employee of Elle Construction Company, one of the plaintiffs herein, went to the home of Wm. S. Gagon, the named insured under the Western policy, and borrowed the key to the 1954 Chevrolet truck from Jessie Gagon, the wife of Wm. S. Gagon, the named insured in the Western policy.

V.

While operating this truck, M. Burke Horsley was involved in an accident from which Arnold Campbell sustained mortal injuries. Suit was brought for his death by Mary Lou Campbell, his widow, against Elle Construction Company, M. Burke Horsley, and Wm. S. Gagon, in the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County. The jury trying said cause returned a verdict against Elle Construction Company predicated upon the doctrine of respondeat superior for Horsley's negligent operation of the truck in the course of his employment. The judgment thus rendered was paid by the plaintiff herein, St. Paul-Mercury as Elle Construction Company's insurer.

V.

Wm. S. Gagon, who was a defendant in said action, as aforementioned, by virtue of the Idaho statutes of owner's liability, obtained a verdict in his favor, the jury having found that the truck was not being operated with his permission and consent.

VI.

This action is one by St. Paul-Mercury, Elle's insurer, to recover against Western the amount they paid for Elle Construction to Mary Lou Campbell, et al.

From the foregoing Findings of Fact, the Court does hereby adopt the following

Conclusions of Law

That the verdict in the State Court action, above referred to, in which the jury found in favor of the insured Gagon operates as a final determination of the issue concerning the operation of the vehicle with the owner's consent. By such finding the jury concluded that M. Burke Horsley was not operating the car with the consent of William S. Gagon, and that question having been finally decided, such finding is not reviewable by this Court in the instant action, and that that determination in the case of Mary Lou Campbell vs. C. H. Elle Construction Company is final, conclusive, and binding upon the parties to this suit.

Let Judgment Enter.

The Court having heretofore made its certain Findings of Fact and adopted certain Conclusions of

Law, It Is Ordered that plaintiffs take nothing by virtue of their Amended Complaint, and that the action be dismissed, the defendant being awarded its costs.

/s/ CHASE A. CLARK,
Chief Judge, United States
District Court.

[Endorsed]: Filed January 31, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, Plaintiffs above named, Hereby Appeal to the United States Court of Appeals For The Ninth Circuit from the Final Judgment entered against them in this action on the 31st day of January, 1958, said Instrument being designated "Findings of Fact and Conclusions of Law and Judgment."

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs-Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 24, 1958.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents: That the United States Fidelity and Guaranty Company, a corporation, as Surety, and C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, as Principals, are held and firmly bound unto Western Casualty and Surety Company, a corporation, in the sum of Two Hundred Fifty Dollars ($250.00), to which we bind ourselves, our successors and assigns, jointly and severally.

Sealed with our hands and Dated this 24th day of February, 1958.

Whereas, on the 31st day of January, 1958, in the above entitled action in the United States District Court for the District of Idaho, Eastern Division, between C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, Plaintiffs, and the said Western Casualty and Surety Company, a corporation, Defendant above named, a Judgment was rendered against said Plaintiffs, and said Plaintiffs have duly filed a Notice of Appeal from said Judgment;

Now, the condition of this Bond is that if said Appeal is disallowed, or the Judgment affirmed, all costs incurred by the Defendant or such costs as the Appellate Court may award in the event such Judgment is affirmed; that the payment of said costs is hereby secured; otherwise, the obligation is to be void.

The undersigned agree that this is a Bond on Appeal from the United States District Court for the District of Idaho, Eastern Division, to the United States Circuit Court of Appeals for the Ninth Circuit; given under the obligation of paragraph (C) of Rule 73 of the Federal Rules of Civil Procedure.

C. H. ELLE CONSTRUCTION CO.,
a corporation,
/s/ By W. F. MERRILL,
One of its Attorneys of Record.

ST. PAUL-MERCURY INDEMNITY CO., a corporation,
/s/ By W. F. MERRILL,
One of its Attorneys of record.
"Principals"

UNITED STATES FIDELITY AND GUARANTY COMPANY,
/s/ By F. F. TERRELL,
Its Attorney-in-fact.

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
/s/ By F. F. TERRELL,
Resident Agent.

[Endorsed]: Filed February 24, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Summons with return attached.
3. Defendant's motion to dismiss.
4. Affidavit of O. R. Baum.
5. Minutes of the court of Oct. 18, 1955.
6. Amended complaint.
7. Motion of C. H. Elle Const. Co., for inspection.
8. Affidavit in support of motion.
9. Minutes of the Court of Oct. 24, 1955.
10. Stipulation—10 days for defendant to enter appearance as to amended complaint after exchange of policies.
11. Affidavit for leave to file amended and supplemental complaint.
12. Motion for leave to file amended and supplemental complaint.
13. Amended and supplemental complaint.
14. Answer to amended and supplemental complaint.
15. Motion of defendant to dismiss action.

16. Motion of defendant to dismiss C. H. Elle Const. Co. from the cause.

17. Motion of defendant to dismiss St. Paul-Mercury Indemnity Co., from the action.

18. Defendant's demand for jury trial.

19. Notice requiring submission of motions on brief.

20. Motion of plaintiffs to strike from answer to amended and supplemental complaint.

21. Notice requiring submission of motions on brief.

22. Stipulation—10 additional days for both parties to file briefs.

23. Order—10 additional days for both parties to file briefs.

24. Minutes of the court of Oct. 8, 1956.

25. Request for admissions filed by plaintiff.

26. Response to request for admissions.

27. Defendant's request for admissions.

28. Defendant's withdrawal of request for trial by jury.

29. Notice of taking deposition of Wm. S. and Jessie Gagon.

30. Plaintiffs' additional request for admissions.

31. Response to defendant's request for admissions.

32. Response to plaintiffs' additional request for admissions.

33. Notice to present motion on Nov. 30, 1956.

34. Motion for production of documents, etc.

35. Depositions of Jessie Gagon and William S. Gagon.

36. Minutes of the court of Nov. 29, 1956.

37. Notice to present motion on Dec. 3, 1956.

38. Motion for production of documents, etc.

39. Minutes of the Court of Dec. 3, 1956.

40. Minutes of the Court of Dec. 7, 1956.

41. Depositions of M. Burke Horsley and C. H. Elle.

42. Stipulation to submit case on files and record.

43. Stipulation and order—time to file briefs.

44. Stipulation—15 additional days for defendant's brief ordered.

45. Stipulation—15 additional days for defendant's brief.

46. Opinion of Judge Clark.

47. Stipulation and order—Jan. 4, 1958 for filing objections to or response to Findings of Fact and Conclusions of Law.

48. Exceptions to findings of fact and conclusions of law and proposed amendments thereto.

49. Order overruling proposed amendments and objections.

50. Findings of fact and conclusions of law and judgment.

51. Acknowledgment of service of notice and bond on appeal.

52. Notice of appeal.

53. Bond on appeal.

54. Designation of record on appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 5th day of March, 1958.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: No. 15932. United States Court of Appeals for the Ninth Circuit. C. H. Elle Construction Co., a corporation and St. Paul-Mercury Indemnity Co., a corporation, Appellants, vs. Western Casualty and Surety Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Eastern Division.

Filed: March 10, 1958.

Docketed: March 17, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals,
For The Ninth Circuit

No. 15932

C. H. ELLE CONSTRUCTION CO., a corporation, and ST. PAUL-MERCURY INDEMNITY CO., a corporation,

Plaintiffs-Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation,

Defendant-Appellee.

STATEMENT OF POINTS ON APPEAL

Plaintiffs-Appellants herewith present their statement of points upon which they will rely on the Appeal in this matter.

I.

That the Trial Court erred in its Conclusions of Law that the Jury Verdict in the State Court action, designated in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bannock, and entitled Mary Lou Campbell, and Terrell Ray Campbell and Curtis Howard Campbell, minors, by their Guardian Ad Litem, Mary Lou Campbell, Plaintiffs, v. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, Defendants, operated as a final determination of the issue as to whether or not the vehicle involved was being operated by the employee of C. H. Elle Construction Company with the consent of the named insured of the defendant herein.

II.

The Trial Court erred in its Finding of Fact V in findings as follows:

"The Jury, having found that the truck was not being operated with his permission and consent."

III.

That the Trial Court erred in entering Judgment in favor of the defendant and against the plaintiffs.

IV.

That the Trial Court erred in not holding, from the files, records and facts in this action, that the vehicle insured by Western Casualty and Surety Company was being operated at the time of the collision with the permission of the named insured under the terms and conditions of the insurance

policy issued by the defendant-appellee, Western Casualty and Surety Company.

V.

That the Trial Court erred in not holding that under the terms of the policy written by the defendant-appellee, Western Casualty and Surety Company, the said plaintiff-appellant herein, C. H. Elle Construction Company, became an also insured, and that the said insurance coverage became the primary insurance coverage up to the limits of the policy so issued by the defendant-appellee Western Casualty and Surety Company.

VI.

That the Trial Court erred in not determining that the use of the vehicle by one M. Burke Horsley as the employee of C. H. Elle Construction Company was within the coverage and uses set forth in the policy issued by the defendant-appellee Western Casualty and Surety Company.

VII.

That the Trial Court erred in not granting Judgment to the plaintiffs and against the defendant-appellee in the amount of $13,630.93, plus interest, plus costs of suit.

Dated this 17th day of March, 1958.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs-Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 19, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the Plaintiffs-Appellants hereby designate for inclusion in the record on Appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed the 24th day of February, 1958, the following portions of the record proceedings and evidence in this action:

1. Complaint.

2. Summons with Return attached.

3. Motion to Dismiss.

4. Record of Hearing of October 18, 1955.

5. Amended Complaint.

6. Motion for leave to file Amended and Supplemental Complaint.

7. Affidavit in support of Motion.

8. Amended and Supplemental Complaint.

9. Answer to Amended and Supplemental Complaint.

10. Motion to Dismiss St. Paul-Mercury Indemnity Co.

11. Motion to Dismiss C. H. Elle Construction Co.

12. Motion to Dismiss.

13. Motion to Strike from Answer to Amended & Supplemental Complaint.

14. Record of Hearing of October 8, 1956.

15. Requests for Admissions, filed Nov. 1, 1956.

16. Response to Requests for Admissions, filed Nov. 9, 1956.

17. Requests for Admissions, filed Nov. 9, 1956.

18. Response to Defendant's Request for Admissions, filed Nov. 19, 1956.

19. Plaintiffs' Additional Requests for Admissions, filed Nov. 19, 1956.

20. Response to Plaintiffs' Additional Requests for Admissions, filed Nov. 26, 1956.

21. Deposition of Jessie Gagon.

22. Deposition of Wm. S. Gagon.

23. Motion for Production of Documents, etc.

24. Record of Hearing of December 3, 1956.

25. Order to Submit on Depositions and Briefs, filed December 7, 1956.

26. Deposition of M. Burke Horsley.

27. Deposition of C. H. Elle.

28. Stipulation Re. Admissions and Submission of Cause on Records and Depositions, filed January 13, 1957.

29. Opinion.

30. Exception to Findings of Fact and Conclusions of Law, and Proposed Amendments to Findings of Fact and Conclusions of Law.

31. Order overruling Proposed Amendments and Objections to Findings of Fact; Conclusion.

32. Findings of Fact, Conclusions of Law, and Judgment.

33. Notice of Appeal.

34. Bond on Appeal.

35. Notice to Appellee.

36. Acknowledgment of Service.

37. Designation of Contents of Record on Appeal.

38. Statement of Points on Appeal.

Dated this 17th day of March, 1958.

MERRILL & MERRILL,
/s/ By W. F. MERRILL,
Attorneys for Plaintiffs-Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 19, 1958. Paul P. O'Brien, Clerk.

No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO., a corporation and ST. PAUL-MERCURY INDEMNITY CO., a corporation,

Appellants.

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation,

Appellee.

Brief of Appellants

Appeal from the United States District Court for the District of Idaho, Eastern Division

FILE
MAY 23 1958
PAUL P. O'BRIEN, C

A. L. MERRILL
R. D. MERRILL
W. F. MERRILL
Residence: Pocatello, Idaho
Attorneys for Appellants

GATEWAY PRINTERS—POCATELLO

No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO., a corporation and ST. PAUL-MERCURY INDEMNITY CO., a corporation,

Appellants.

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation,

Appellee.

Brief of Appellants

Appeal from the United States District Court for the District of Idaho, Eastern Division

A. L. MERRILL
R. D. MERRILL
W. F. MERRILL
Residence: Pocatello, Idaho
Attorneys for Appellants

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No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO., a corporation and ST. PAUL-MERCURY INDEMNITY CO., a corporation,

Appellants.

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation,

Appellee.

Brief of Appellants

JURISDICTION

This action was commenced in the United States District Court for the District of Idaho, Eastern Division, by filing of Complaint on September 19, 1955 (R.3-7) and Service of Summons on Leo O'Connell, Commissioner of Insurance for the State of Idaho, statutory agent for defendant, on September 22, 1955 (R.7-8). Jurisdiction is based upon

diversity of citizenship and the amount in controversy exceeding $3000.00, exclusive of interest and costs (R.3, 17, 22, 23). The jurisdiction of the District Court is invoked pursuant to 28 U.S.C.A., Section 1332.

On January 31, 1958, the District Court entered Judgment in favor of defendant and against the plaintiff (R.192-196), and on February 24, 1958, Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, was filed by plaintiff.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C.A. Section 1291 and 1294.

QUESTIONS PRESENTED AND MANNER IN WHICH THEY ARE RAISED

I.

Whether the Trial Court erred in holding that the verdict in the State Court action of Campbell et al v. Elle et al operated as a final determination of the issue as to whether the vehicle involved, being driven by M. Burke Horsley, an employee of C. H. Elle Construction Company, was being operated with the consent of the named insured of appellee. This and incidental questions are raised by the Opinion (R. 182-186) and Exceptions to Findings of Fact and Conclusions of Law and Proposed Amendments to Findings of Fact and Conclusions of Law (R.187-190).

II.

Whether the Trial Court erred in not holding that the vehicle insured by the appellee was being operated at the time of the collision within the provisions of the wording of the "omnibus clause," contained in the policy of insurance issued by the appellee. This question is raised by the Opinion of the Court (R.182-186) and Exceptions to Findings of Fact and Conclusions of Law and Proposed Amendments to Findings of Fact and Conclusions of Law (R.187-190).

III.

Whether the Trial Court erred in not determining that the use of the vehicle was within the coverage and use set forth in the insurance policy issued by the appellee. This question is raised by the Opinion of the Court (R.182-186) and the Exceptions to Findings of Fact and Conclusions of Law and Proposed Amendments to Findings of Fact and Conclusions of Law (R.187-190).

IV.

Whether the Trial Court erred in not adopting the Proposed Findings of Fact and Conclusions of Law presented by appellants. This question is raised by the Opinion of the Court (R.182-186) and Exceptions to Findings of Fact and Conclusions of Law and Proposed Findings of Fact and Conclusions of Law (R.187-190).

V.

Whether the Judgment of the Trial Court ought to be reversed and Judgment entered for the appellants in the amount of $13,630.93 plus interest and costs.

STATEMENT OF FACTS

On August 22, 1954, there was in effect Policy No. UI-518973 issued by the Western Casualty and Surety Company, defendant herein, to William S. Gagon, Soda Springs, Idaho, covering a certain 1954 Chverolet 6-wheel 2-ton truck, Serial No. X54F018590. On August 22, 1954, and for many years prior thereto, Mr. William S. Gagon and Jessie Gagon, had been husband and wife, living in Soda Springs, State of Idaho (R.108).

In the City of Soda Springs, Idaho, there is a lumber yard known as Gagon Lumber Yard, operated by Mr. Gagon, and Mrs. Gagon was, as well as having her community property interest therein, the bookkeeper, and as such was actively engaged in assisting in running the business (R.108). On August 22, 1954, they owned the above described vehicle (R.109).

One M. Burke Horsley was employed by C. H. Elle Construction Company, a corporation, and was so acting during the activities set forth hereafter (Request for Admissions II (d) and (e), (R.47); together with Responses thereto (R. 60-61; R.137). On August 22nd, 1954, the said M. Burke Horsley was operating the above described Chevrolet Truck

in an easterly direction on U. S. Highway 30 North at a point approximately two and one-half miles west of Soda Springs, Caribou County, Idaho, when he was involved in a collision with a vehicle driven by one Arnold Campbell (Plaintiffs' Request for Admissions II (c) (R.47); Response (R.60). As a result of said collision, the said Arnold Campbell lost his life, and on the 28th day of February, 1955, an action was filed in the District Court of the Fifth Judicial District of the State of Idaho, In and For the County of Bannock, by Mary Lou Campbell, his widow, and Terrell Ray Campbell and Curtis Howard Campbell, his children, against C. H. Elle Construction Company, a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, said Complaint praying for money damages for the death of Arnold Campbell, in the amount of $100,000.00 and further praying for property damage to the vehicle of Arnold Campbell in the amount of $1,620.00 (copy of 2nd Amended Complaint attached to Stipulation (R.153-159); Plaintiffs' Request for Admissions, paragraph II (f) (R.47); Response (R.61). Demand was made upon the defendant, Western Casualty and Surety Company to assume the defense, costs and other obligations pursuant to the contract of insurance noted above, said demand being a letter dated March 30, 1955, addressed to Western Casualty Company, Fort Scott, Kansas, through: O. R. Baum, Attorney at Law, Carlson Building, Pocatello, Idaho (Plaintiffs' Request for Admissions, paragraph II (i). (R.49, 57-58) and Response thereto (R.62). Defendant refused to assume the defense, to pay the costs and other obligations of said action.

Upon Defendant's refusal, as above, St. Paul-Mercury Indemnity Company, by virtue of its multiple coverage policy, Policy No. 6210145 covering C. H. Elle Construction Company, provided the defense of the said C. H. Elle Construction Company, M. Burke Horsley, and Max Larsen. (Stipulation, (R.151). On October 3, 1954, the Second Amended Complaint was answered on behalf of C. H. Elle Construction Company and M. Burke Horsley (see Exhibit C and Exhibit C-1 attached to Stipulation, (R.166-176). As a result of the refusal of the Western Casualty and Surety Company to assume the defense in the case of Campbell, et al, vs. C. H. Elle Construction Company, et al, the present action was filed on September 19, 1955 and service obtained September 22, 1955 (R.7). Original complaint was later amended, bringing in the St. Paul-Mercury Indemnity Company, for the reason that Judgment in the State Court case had been rendered and the St. Paul-Mercury Indemnity Company had paid said judgment and costs (R.17.22).

On the 23rd day of December, 1955, a Judgment was entered in the State Court in favor of Mary Lou Campbell and Terrell Ray Campbell and Curtis Howard Campbell against C. H. Elle Construction Company and M. Burke Horsley, in the amount of $15,000.00 with costs in the amount of $371.40. This Judgment was the result of the verdict of the jury (Exhibit D, Exhibit E and Exhibit F of the Stipulation (R.177-179).

In addition to the payment of the above described

amounts, the appellants incurred attorneys' fees and costs of said counsel in the amount of $1,500.00 for attorneys' fees and $139.53 for costs advanced by counsel (Paragraph III (b) of Stipulation with attached statement. (R.151, 181-182).

Under the above described policy of insurance written by the Western Casualty and Surety Company, there is contained as Paragraph III under insuring agreements the following: "With respect to the insurance of bodily injury liability and for property damage liability, the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission * * *" (R.52). Said policy also contains the following provision under Paragraph II of insuring agreements: "As respects the insurance afforded by the other terms of this policy under coverages A and B, the company shall:

> "a. Defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if said suit is groundless, false or fraudulent; * * *" (R.52).

The existence of the policy of Western Casualty and Surety Company is admitted (R.60). The fact that M. Burke Horsley was operating the 1954 Chevrolet Truck and was involved in a collision, is admitted (R.47). The facts of the state court suit and judgment and payment are admit-

ted (R.47, 61, 151). The basic question of fact is whether or not the use of this vehicle by M. Burke Horsley comes within the provisions of the so-called "omnibus clause". That is, whether or not M. Burke Horsley was using said truck with the permission as set out in said clause. The facts as to such permission will be set forth hereinafter during the argument.

It should also be noted that under date of October 5, 1954, there was filed S.R. 21, Notice of Policy, under Section 5 of Idaho Motor Vehicle Safety Responsibility Act signed by A. W. Kay, Secretary, Amercian Agencies, Inc., General Agents, Western Casualty and Surety Company, Fort Scott, Kansas. This S. R. 21 states that the policy of Western Casualty and Surety Company did apply to the above operator, M. Burke Horsley (R.151).

The case was thereupon submitted to the trial court pursuant to the Stipulation with documents attached, the Requests for Admission and Replies, and the depositions of Jessie Gagon, Wm. S. Gagon, M. Burke Horsley, and C. H. Elle (R.151-182).

Whereupon, the trial court pursuant to Opinion, dated September 25, 1957, ruled that the verdict in the state court action by which the jury found in favor of Gagon, was conclusive on the issue of permissive use as prescribed in the present action, and ordered judgment in favor of defendant-appellee (R.182-186). Judgment was entered on February 24, 1958 (R.196).

SPECIFICATION OF ERRORS

I.

The Trial Court erred in holding that the verdict in the state court action of Campbell et al v. Elle et al operated as a final determination of the issue as to whether or not the vehicle involved was being operated by the employee of C. H. Elle Construction Company with the consent of the named insured of the appellee herein.

II.

The Trial Court erred in not holding that the vehicle insured by Western Casualty and Surety Company was being operated at the time of the collision with the permission of the named insured under the terms and conditions of the insurance policy issued by appellee.

III.

The Trial Court erred in not holding that the appellant, C. H. Elle Construction Company, became an also insured, and that the insurance coverage under the policy of the appellee became the primary insurance coverage up to the limits of said policy.

IV.

The Trial Court erred in not holding that the use of the vehicle by M. Burke Horsley, as employee of C. H. Elle

Construction Company, was within the coverage and uses set forth in the policy issued by appellee.

V.

The Trial Court erred in not holding that appellee had the duty to defend C. H. Elle Construction Company and M. Burke Horsley in the state court action of Campbell et al v. Elle et al, and in not holding that appellee was required to pay the costs, interests and the judgment therein, up to the limits of its policy.

VI.

The Trial Court erred in finding that portion of Findings of Fact No. II as follows:

> "Said policy last referred to also contains the following provisions:
>
> "This Insuring Agreement does not apply * * * under Section A (except with respect to liability assumed under contract) 1. Bodily Injury to or sickness, disease or death of any employee of the named Insured while engaged in the employment of the Insured, other than domestic employees with respect to the operation, maintenance, or repair of an automobile'."

on the grounds and for the reason that the same is immaterial.

VII.

The Trial Court erred in finding that portion of Findings of Fact No. III as follows:

> "* * * On that date M. Burke Horsley, an employee of Elle Construction Company, one of the plaintiffs herein, went to the home of Wm. S. Gagon, the named insured under the Western policy, and borrowed the key to the 1954 Chevrolet truck from Jessie Gagon, the wife of Wm. S. Gagon, the named insured in the Western policy."

on the grounds and for the reason that, in view of the evidence, said Finding is incomplete and inaccurate.

VIII.

The Trial Court erred in its Conclusions of Law as follows:

> "That the verdict in the State Court action, above referred to, in which the jury found in favor of the insured Gagon operates as a final determination of the issue concerning the operation of the vehicle with the owner's consent. By such finding the jury concluded that M. Burke Horsley was not operating the car with the consent of William S. Gagon, and that question having been finally decided, such finding is not reviewable by this Court in the instant action, and that that determination in the case of Mary Lou Campbell vs. C. H. Elle Construc-

> tion Company is final, conclusive, and binding upon the parties to this suit,"

on the grounds that the same is not supported by the evidence and is contrary to law.

IX.

The Trial Court erred in refusing to adopt the Conclusions of Law proposed on behalf of the appellants as set out at R.189-190.

X.

The Trial Court erred in entering Judgment in favor of the appellee and against the appellants.

ARGUMENT

I.

VERDICT IN PRIOR STATE COURT ACTION WAS NOT RES JUDICATA AND NOT DETERMINATIVE OF PRESENT ACTION

It is the position of the appellants that the trial court erred in holding that the jury verdict in the state court action was a final determination of the basic question in the case at bar.

In the state court action, Mary Lou Campbell, et al,

brought an action against C. H. Elle Construction Company, a corporation, M. Burke Horsley, Max Larsen and W. S. Gagon as defendants. Horsley and Larsen were sued for negligent operation of a truck which allegedly caused the death of one Arnold Campbell, while C. H. Elle Construction was made a party under the doctrine of respondeat superior as the employer of Horsley, and the allegations against W. S. Gagon were based upon the imputed negligence statute of the State of Idaho Section 49-1004 (R.30). There were no adversary pleadings between these various co-defendants, and there could not have been.

The jury in the state court case held against M. Burke Horsley and C. H. Elle Construction on the grounds of negligence, and further held, by their verdict, that the negligence of M. Burke Horsley was not imputed to W. S. Gagon under provisions of Idaho Code, Section 49-1004.

The present suit began (after the complaint was filed in the Campbell suit but before answers were filed therein by any of the defendants) as a result of the demand from C. H. Elle Construction Company that the Western Casualty and Surety Company honor its policy provisions set forth in Policy UI518973 with Wm. S. Gagon as insured, which, under the "omnibus clause" and "duty to defend" clause, it was alleged, required the Western Casualty & Surety Company to assume the defense of C. H. Elle Construction Company and M. Burke Horsley and to pay any judgment against them up to the limits of the policy, and to pay all costs of defense.

The question and issue herein is the interpretation of the provisions of Policy UI-518973 issued by Western Casualty and Surety Company. This is distinct, different and not related to the issue presented in the state court dealing with the phrasing of the statutory provisions of Section 49-1004, Idaho Code.

The "omnibus clause" in an automobile liability policy is not intended to extend coverage only to such other users of insured's vehicle as whose negligence would be imputed to the named insured under the permissive use statutes. Pleasant Valley Lima Bean Growers and Warehouse Assn. vs. Cal-Farm Ins. Co., 298 P.2d 109 (Calif.). As pointed out in this case, an "omnibus clause" is not necessarily synonymous and identical with the "permissive use" statutes such as prevail in the State of California and, incidentally, the State of Idaho.

It is submitted that the issues framed in the State Court action and the issues in this action are different. To maintain successfully a plea of res judicata it must appear that the precise question was raised and determined in a former suit. Nowhere did the state court have before it the insurance contract now involved. Nowhere in the state court proceeding was the phrasing and wording of the insurance policy of Western Casualty and Surety Company considered. The state court suit, as far as Gagon was concerned, was upon the imputed negligence or permissive use statutes of the State of Idaho. The present suit is upon the interpretation of a contract and the contractual relation growing out of the insurance policy. The issues were not, as is required for a

holding of res judicata, precisely the same. There is no identity of the thing sued for; there is no identity of the cause of action; there is no identity of the parties; and there is no identity of the persons for or against whom the claim is made.

The Supreme Court of the State of Idaho has held many times that if the precise question was not raised and determined in a former suit, the defense of res judicata could not be maintained.

In Collard vs. Universal Automobile Ins. Co., 55 Idaho 560, 45 P.2d 288, Syllabus 8 is as follows:

> "To successfully maintain plea of res judicata, it must appear that precise question was raised and determined in former suit."

On Page 292 of Pacific reports, the Court states as follows:

> "The plea of res judicata is an affirmative defense, and the burden rests on the party asserting it to establish all of the essential elements thereof by a preponderance of the evidence. Abraham vs. Owens, 20 Or. 511,, 26 P. 1112. From an examination of the record and the authorities, we are not constrained to hold that the plea of res judicata and estoppel were established by the appellant. It would seem quite clear that the present action presents an entirely different cause of action than that involved in the case

of Peterson vs. Universal Automobile Ins. Co., supra, and, even conceding that respondent was a party or privy to that action, in order to successfully maintain the plea of res judicata, it must have been made to appear that the precise question was raised and determined in the former suit. Rogers vs. Rogers, 42 Idaho, 158, 243 P. 655."

In the case of Rogers vs. Rogers, 42 Idaho 158, 243 P. 655, syllabus 2 is as follows:

> "The identical issue must have been raised and determined in a former suit for its decree to be res judicata of question."

And on Page 656 Pac. Rep. the court states as follows:

> "Identity of issue is one of the essentials of res adjudicata, and it must appear that the precise question was raised and determined in the former suit. Wood River Power Co. vs. Arkoosh, 215 P. 975, 37 Idaho, 348; Mason vs. Ruby, 204 P. 1071, 35 Idaho, 157; Berlin Machine Works vs. Dehlbom L. Co., 160 P. 746, 29 Idaho, 494; Marshall vs. Underwood, 221 P. 1105, 38 Idaho, 464."

In Mason vs. Ruby, 35 Idaho, 157, 204 P. 1071, the court states as follows on Page 1072 Pac. Rep.

> "In other words, respondent claims that in order to constitute the judgment of the probate court a bar

to this action appellant must show clearly, not only that this question was raised by the pleadings, but that it was actually decided by the probate court in that action.

"We think the contention of respondent must be sustained. The decision of the probate court may have rested upon either one or the other of the grounds stated, and there is a total lack of evidence showing that the question of warranty was decided in the probate court. In the case of Russell vs. Place, 4 Otto (94 U.S.) 606, 24 L. Ed. 214, it was said by Justice Field:

"A judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties; but to this operation of judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, the whole subject-matter of the action will be at large and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined."

"See, also, Goodenow vs. Litchfield, 59 Iowa, 226, 9 N. W. 107, 13 N.". 86; Zoeller vs. Riley, 100 N. Y. 102, 2 N.E. 388; 53 Am. Rep. 157; Fowlkes vs. State, 14 Lea, (Tenn.) 14; Chamberlain vs.

Gaillard, 26 Ala. 504; Hoover vs. King, 43 Or. 281, 72 Pac. 880, 65 L.R.A. 790, 99 Am. St. Rep. 754; Lea vs. Lea, 99 Mass. 493, 96 Am. Dec. 772; 23 Cyc. 1308; 15 R.C.L. s 454, p. 980.

"In this state of the evidence the court did not err in giving the instruction objected to."

In Marshall vs. Underwood, 38 Idaho 464, 221 P. 1105, the Idaho Supreme Court states as follows relative to the identity of the issues:

"And in order that this rule should apply, it must clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, that the precise point or question in issue in the second suit was involved and decided in the first. Jensen vs. Berry & Ball Co., 37 Idaho, 394, 216 Pac. 1033; 23 Cyc. 1300."

See also Miller vs. Mitcham, 21 Idaho 741, 123 P.941; Wood River Power Company vs. Arkoosh, 37 Idaho 348, 215 P. 975; Jensen vs. Berry & Ball Co., 37 Idaho 394, 216 P. 1003; Lawrence vs. Corheille, 32 Idaho 114, 178 P.834.

The cause of action, therefore, between the state court action and the present action, is different. The parties are different, the issues are different, and, more important, C. H. Elle Construction Company and Gagon, the insured of the

present appellee, were co-defendants in the state court proceeding, and no adversary proceeding was had between them or their insurance carriers.

The law, we submit, is that a judgment in favor of a plaintiff in an action against two or more defendants is not re judicata or conclusive of the rights and liabilities of the defendants *inter se* in a subsequent action between them unless those rights and liabilities are expressly put in issue by adversary pleadings and determinations.

The question now before the court in this action is not based upon the pleadings of Mary Lou Campbell and her children (plaintiffs in the state action) but is based upon an interpretation of the wording of the policy of insurance issued by the Western Casualty & Surety Company, which company was not a party in the state court proceedings and could not have been made a party. C. H. Elle Construction Company and its employee, M. Burke Horsley, were co-defendants with Wm. S. Gagon in the state court action. There were no adversary proceedings between them; there were no pleadings or claims, one against the other. The liabilities as between the insuror of C. H. Elle Construction Company and the insuror of Wm. S. Gagon were not, and could not have been, presented in the state court action. The state court action was one in tort against several tort feasors, and any allegation of insurance coverage of either or any of the defendants, or allegations of a dispute between the insurance carriers of any of the defendants, was not covered and could not have been made an issue.

Because there was no adversary position, C. H. Elle Construction Company could not control the pleadings against Gagon; nor could it control the evidence used against Gagon adduced by the plaintiffs in the state court action. C. H. Elle Construction Company could not introduce controverting evidence.

Because the Western Casualty & Surety Company was not a party, some of the evidence now available as to permissive use under the terms of the policy could not be introduced in the state court action. Some of these items of evidence include the wording of the policy of Western Casualty & Surety Company; the admission of permissive use contained in the SR-21 which appellants herein contend is now material because it is an admission against interest by a party to the present suit; the fact of the duty to defend C. H. Elle Construction Company and M. Burke Horsley which arises from the wording of the policy issued by the Western Casualty & Surety Company; the conversations between Wm. S. Gagon and the agent of the Western Casualty & Surety Company, as are now presented in the evidence in this action.

C. H. Elle Construction Company could not appeal the verdict and judgment rendered thereon in the state court as it dealt with the question between the plaintiffs therein and Wm. S. Gagon. They would have had no standing in an appellate court to get a review of this question. They had no control over the presentation, judgment, or appeal of this question. It is submitted that the question now presented was not and could not have been adjudicated in the state court

proceedings, and as a result there could be no estoppel or rule of res judicata to bar the presentation of the present controversy.

As stated in 30-A Amer. Juris. 466, Judgments, Section 411,

> "The generally prevailing view is that parties to a judgment are not bound by it in subsequent controversies between each other, where they are not adversary in the action in which the judgment is rendered and their rights and liabilities inter se are not put in issue and determined. This is true whether judgment is rendered in favor of the plaintiff or determining the issues in favor of the defendant. The rule applies to a fact which might have been, but was not, litigated in the original action. The theory of many decisions supporting the general rule is that the judgment merely adjudicates the rights of the plaintiff as against each defendant, and leave unadjudicated the rights of the defendants as among themselves."

In Dobbins vs. Barnes (CA 9) 204 F.2d 546, the court holds in Syllabus 1 as follows:

> "Parties to action are not bound by judgment, in subsequent controversy with each other, unless they were adversary parties in original suit."

On Page 548, it is stated:

> "* * * In the proceedings in the Tax Court Dobbins and Barnes were not adversaries. It is a rule of universal application that 'Parties to an action are not bound by the judgment, in a subsequent controversy with each other, unless they were adversary parties in the original suit.' City Bank of Wheeling vs. Rhodehamel, 4 Cir., 223 F. 979, 983. 'The reason for the rule is that one should not be bound by a judgment except to the extent that he or some one representing him had an adequate opportunity to litigate the issue adjudicated with the party who seeks to invoke the judgment against him.' Ohio Casualty Ins. Co. v. Gordon, 10 Cir., 95 F.2d 605, 609. This rule, stated in Freeman on Judgments, 5th Ed., Vol. 1, s 422, is followed in California, Standard Oil Co. vs. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797, and is recognized in Pennsylvania, Jordan vs. Chambers, 226 Pa. 573, 75 A. 956; Simodejka vs. Williams, 360 Pa. 332, 62 A.2d 17."

In the case of Brown vs. Great American Indemnity Co. (Mass.), 9 N. E. 2d 547, at 549, the following quotation indicates the holding of the Court:

> "That decision by the Supreme Court of Rhode Island did not adjudicate the controversy now before us. It is true that both the plaintiff and the defendant were parties defendant in the suit in Rhode Island.

> But they were not adversaries. There was no controversy between them. The present plaintiff was seeking no relief against the present defendant. Both were summoned to defend against Byron's attempt to reach the proceeds of the policy. The rights of the present plaintiff against the present defendant were not adjudicated, even though Byron, who in reason was in fully as favorable a position as the present plaintiff. Commonwealth vs. Newton, 186 Mass. 286, 71 N.E. 699; Bluefields Steamship Co., Ltd., vs. United Fruit Co. (C.C.A.) 243 F. 1, 19; The No. 34 (Petition of L. Boyer's Sons Co.) (CCA) 25 F. 2d 602; Pearlman vs. Truppo, 159 A. 623, 10 N.J. Misc. 477; Snyder vs. Marken, 116 Wash. 270, 199 P. 302, 22 A.L.R. 1272."

This question was exhaustively treated in the case of Mickadeit vs. Kansas Power & Light Co. (Kansas), 257 P.2d 156. On Page 161 the court states as follows:

> "In 101 A.L.R. 104 is an annotation on 'Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and the nonliability of the other,' where after stating the principal aspects as to the question, it is said:
>
> " 'While the cases are not entirely in harmony, sometimes even in the same jurisdiction, the rule

supported by the great weight of authority is that a judgment in favor of the plaintiff in an action against two or more defendants is not res judicata inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in the first action, by cross complaint or other adversary pleadings, and determined by the judgment in the first action.'

"Many authorities are cited in support of the rule stated in the discussion treating the various phases of the question. See also supplementary annotation on the same subject in 142 A.L.R. 727, and annotation on a related subject in 25 A.L.R. 2d 710.

"In discussing the conclusiveness of a judgment as to coparties it is said in 50 C.J.S., Judgments, s 819, p. 372, that

" 'A judgment ordinarily settles nothing as to the relative rights and liabilities of the coplaintiffs or codefendants inter sese, unless their hostile or conflicting claims were actually brought in issue, litigated, and determined'."

In the case of Preferred Accident Ins. Co. of New York vs. Musante, Berman & Steinberg Co. (Conn.), 52 A.2d, 862, Syllabus 5 is as follows:

"Judgment against codefendants creates no lia-

bility between them if none before existed."

Syllabus 6 is as follows:

> "A judgment in favor of plaintiff in an action against two or more defendants is not res adjudicata or conclusive of the rights and liabilities of defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in first action by cross-complaint or other adversary pleadings, and determined by the judgment in the first action."

And on Page 864, the court states:

> "* * * There were no adversary pleadings. The record does not show an attempt by either the present defendant or the lessees to escape liability by claiming that the other was solely liable. It does not fairly appear that they were adversaries, at least to such an extent as to render the judgment conclusive as to the rights and liabilities of the codefendants as to each other."

The holding in the case of Remus vs. Schwass, (Ill.) 92 N.E.2d 127, is clearly set forth, beginning at Page 131:

> "* * * An analysis of the record discloses that in the dramshop action the answers filed by appellant and appellees were both addressed to the allegations of the complaint filed there and do not purport to controvert any question of equitable ownership as

> between them, and no adjudication of such issue was made. The parties to the instant case were on the same side in the dramshop case. The rule is that parties on the same side of litigation are not bound by a judgment or decree in subsequent controversies between them respecting their rights, unless they have formed or contested an issue respecting the same and the judgment or decree has determined such rights. Jones vs. Koepke, 387 Ill. 97, 55 N.E.2d 154, and cases there cited. We are of the opinion the appellant here is not barred from asserting her equitable claim."

In the case of Bunge vs. Yager (Minn.), 52 N.W.2d 446, Syllabus 1 is as follows:

> "A judgment in favor of a plaintiff in an action against two or more defendants is not res judicata or conclusive of rights and liabilities of defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in first action, by cross-complaint or other adversary pleadings, or such issues were tried by consent and determined by judgment in first action."

Syllabus 2 states as follows:

> "Rule that parties must be adversaries before judgment in favor of a plaintiff in an action against both of them is res judicata or conclusive of rights and liabilities of parties inter se in a subsequent action between them applies as well to an estoppel by judg-

ment as to an estoppel by verdict."

On Page 447 the court states:

"While the authorities are not in harmony, the general rule followed by the great weight of authority is that a judgment in favor of a plaintiff in an action against two or more defendants is not res judicata or conclusive of the rights and liabilities of the defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in the first action, by cross complaint or other adversary pleadings, or such issues were tried by consent and determined by the judgment in the first action. The cases are collected in Annotations, 101 A.L.R. 104, 142 A.L.R. 27; 30 Am. Jur., Judgments, s. 233.

"The general rule is stated in Restatement, Judgments, s 82, as follows: 'The rendition of a judgment in an action does not conclude parties to the action who are not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate, between themselves.'

"In 1 Freeman, Judgments (5th ed.) s 422, we find the rule stated thus: 'Parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action. There must have been an issue or con-

troversy between them. The reason for this rule obviously is the same as that which underlies the whole doctrine of res judicata, namely, that a person should not be bound by a judgment except to the extent that he, or someone representing him, had an adequate opportunity not only to litigate the matters adjudicated, but to litigate them against the party (or his predecessor in interest) who seeks to use the judgment against him.'

"We early became committed to the same rule. In Pioneer Savings & Loan Co. vs. Bartsch, 51 Minn. 474, 479, 53 N.W. 764, 765, 38 Am. St. Rep. 511, speaking through Mr. Justice Mitchell, we said: 'It is well settled that parties to a judgment are not bound by it in a subsequent controversy between each other, unless they were adversary parties in the original action. Freem.Judgm. s 158'."

See also the annotation, 101 A.L.R. 104-108, with cases cited therein, footnote to Sec. 411 Judgments, 30-A Amer. Jur. 466; Walin vs. Young (Ore.) 180 P. 2d 535; Crompton vs. Lumberman's Mutual Casualty Co. (Mass.); 135 N.E. 2d 14; The Rainbow Stone Co. vs. The Ten Color Stone Co. (Ohio), 141 N.E. 2d 266; Whitney vs. Employers Indemnity Corp. (Iowa.), 202 N.W. 236.

II.

APPELLATE COURT HAS AUTHORITY TO DETERMINE ISSUES HEREIN

The entire proceedings in this case were submitted to the

trial judge upon a written Stipulation with exhibits attached (R.149-182), Requests for Admission and Replies to Request for Admission filed by the respective parties (R.46-103), Plaintiffs' Additional Request for Admission and Response thereto (R.103-106), Deposition of Jessie Gagon (R.106-118), Deposition of William S. Gagon (R.119-130), Deposition of M. Burke Horsley (R.135-144), and the Deposition of C. H. Elle (R.144-148). The record is, therefore, complete and consists entirely of documentary and written evidence. In addition the record, as presented, is essentially uncontradicted and contains no basic factual disputes. No issue of the credibility of witnesses exists and the record does not present any genuine issue as to material fact. Under these circumstances, it is proper for, and the duty of, the Appellate Court to consider the whole record since the Appellate Court is in as good a position as the Trial Court to appraise the evidence and the questions of law presented thereby.

Since the Trial Court made no findings on any of the basic issues of the case, other than the one discussed in Paragraph I above and since the case was submitted on documentary and written evidence, it is submitted that it is proper and essential for the Appellate Court to decide the remaining issues.

In Kostelac vs. United States (C.A.9) 247 F. 2d 723, syllabus 1 is as follows:

> "Where substantially all facts are stipulated in pre-trial order, and trial court makes no finding of

> facts on issue, and evidence before reviewing court on issue is written as it was before trial court, it is proper for reviewing court from such uncontroverted written evidence to make finding of fact on issue."

On Page 726, the Court states as follows:

> "The District Court found that there was 'no question but that Kostelac made an error * * * when he prepared his bid', but concluded that it was unnecessary to decide whether Kostelac ever had such a right, because, if he did, he had waived it.
>
> "However, this question is not only material, it is the first question which must be decided. Since substantially all of the facts concerning the contract, the negotiations after the mistake was discovered, and Kostelac's default were stipulated in the pretrial order, the question before this court would be whether the trial court's finding on this point was supported by the record, if the trial court had made a finding. Since the court has made no finding and since the evidence on this question is written, as it was before the trial court, it is proper for this court from such undisputed written evidence to decide whether Kostelac was entitled to rescind the contract because of the mistake as to the quantity of garbage produced per man per day at the base."

In this decision, the Court of Appeals, Ninth Circuit, quotes with approval, the case of Orvis vs. Higgins, (CCA.2)., 180 F.2d 537.

In the case of Yanish vs. Barber, (C.A.9) 232 F.2d 939, syllabus 11 is as follows:

> "A recognized exception to general rule requiring a case to be sent back for lack of findings is where record considered as a whole does not present a genuine issue as to any material fact. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A."

Syllabus 12 is as follows:

> "When facts are undisputed, though no finding is made, case need not be remanded. Fed. Rules Civ. Proc. rule 52, 28 U.S.C.A."

On Page 947, the Court says:

> "But not every case, where there is a failure to make findings must be sent back to the district court. 'The fact that the district judge made on findings and announced no conclusions upon this issue, does not require remand, since the record is complete', Hazeltine Research, Inc., vs. General Motors Corp., 6 Cir., 1948, 170 F.2d 6, 10.
>
> "Moore's Federal Practice (2d Ed.) Vol. 5, states at p. 2662, 'The failure of the trial court to comply with Rule 52, while characterized as a dereliction of duty does not demand a reversal 'if a full understanding of the question presented may be had without the aid of separate findings',' quoting from Shellman vs. Shellman 1938, 68 App.D.C. 197, 95 F.2d 108, 109, and citing cases.

> "A recognized exception to the general rule, requiring a case to be sent back for lack of findings, is where '* * * the record considered as a whole does not present a genuine issue as to any material fact * * *'. Burman vs. Lenkin Const. Co., 1945, 80 U. S. App. D.C. 125, 149 F.2d 827, 828. See Urbain vs. Knapp Brothers Mfg. Co., 6 Cir., 1954, 217 F.2d 810, 816, 817, quoting Burman vs. Lenkin Const. Co., supra, with approval. So when the facts are undisputed, though no finding is made, the case need not be remanded, Sbicca-Del Mac, Inc., vs. Milius Shoe Co., 8 Cir., 1955, 145 F.2d 389, 400, and cases cited; Aetna Life Ins. Co. vs. Meyn, 8 Cir., 1943, 134 F.2d 246, 249."

In the case of Equitable Life Assurance Society of the United States vs. Irelan (CCA 9) 123 F.2d 462, the trial court made a finding of accidental death in a suit on a double indemnity clause of an insurance policy. The Appellate Court determined that the evidence, which was by deposition, overcame the presumption of accident considered controlling by the trial court and that the facts proved suicide, whereupon judgment was so entered. Syllabus 2 is as follows:

> "Where all testimony bearing on circumstances antecedent to and surrounding death of insured was by deposition, the finding of accidental death, while entitled to consideration has not the weight appellate court would otherwise be obliged to concede to it, since appellate court is in as good a position as trial

court was to appraise the evidence, and has the burden of doing that. Federal Rules of Civil Procedure, rule 52 (a), 28 U. S. C. A. following section 723c."

Syllabus 3 is as follows:

"The federal rule relating to findings by the court was intended to accord with the decisions on the scope of review in federal equity practice, wherein if testimony is by deposition, reviewing court gives slight weight to the findings. Federal Rules of Civil Procedure, rule 52 (a), 28 U. S. C. A. following section 723c."

In the case of Smith vs. Dravo Corp., (C.A.7), 208 F. 2d 388, on Page 391 the court states:

"The findings and conclusions made in our original decision and amplified by this one are amply justified without remand for additional findings as to those items. Under Title 28 U.S.C. at 2106 the appellate court may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order * * * and may remand the cause and direct the entry of such appropriate judgment, decree, or order" as may be "just under the circumstances." Ordinarily, as to issues upon which no findings have been made, the court will reverse with directions to make findings and conclusions, but in equity, where the record is complete or the evidence uncontradicted or entirely documentary, the appellate court is bound to decide

the case, so far as it is in condition to be decided, and direct such a decree as under all circumstances may be proper. Ridings v. Johnson, 128 U. S. 212, 9 S. Ct. 72, 32 L. Ed. 401; U.S. vs. Rio Grande Dam & Irrigation Co., 184 U.S. 416, 22 S. Ct. 428, 46 L. Ed. 619; Weeks vs. Pratt, 5 Cir., 43 F.2d 53, certiorari denied 282 U.S. 892, 51 S. Ct. 106, 75 L.Ed. 786; Potter vs. Beal, 1 Cir., 50 F. 860. In Shore vs. United States, 7 Cir., 282 F. 857 this court said at 860: 'There is no question but that this court, on an appeal from a decree in an equity suit, may consider the evidence, and make findings of fact which are determinative of the controversy.' In McComb vs. Utica Knitting Co., 2 Cir., 164 F. 2d 670, at page 674, the court, after observing that the trial judge did not discuss a certain question or make any finding on it, citing a number of cases, said: 'As that evidence is entirely documentary, no issue of witness' credibility arises; therefore, we can pass on the facts as well as could the trial judge, and need not remand for a finding by him.' In Weeks vs. Pratt, 1 Cir., 43 F.2d 53, 56, the court concluded 'This is an appeal in equity. The whole case is before us, and we may render such decree as may be just and proper in in premises. Ridings vs. Johnson, 128 U.S. 212, 9 S.Ct. 72, 32 L. Ed. 401'."

In McComb vs. Utica Knitting Co., (CCA2), 164 F.2d 670, at 674 the court states:

"In the instant case, the trial judge did not dis-

cuss this question, nor did he make any finding which bears on it. All the evidence here of a kind similar to that in the Belo record we have also set forth in our Appendix. As that evidence is entirely documentary, no issue of witness' credibility arises; therefore, we can pass on the facts as well as could the trial judge, and need not remand for a finding by him."

And in the footnotes on Page 674, the court cites as its authority the following:

> "Kind vs. Clark, 2 Cir., 161 F.2d 36, 46; Letcher County vs. De Foe, 6 Cir., 151 F.2d 987, 990; Bowles vs. Beatrice Creamery Co., 10 Cir., 146 F. 2d 774, 780; J. S. Tyree, Chemist, Inc., v. Thymo Borine Laboratory Co., 7 Cir., 151 F.2d 621, 624; Equitable Life Assurance Society of United States vs. Irelan, 9 Cir., 123 F.2d 462, 464."

To the same effect see Norment vs. Stillwell (CCA2), 135 F.2d 132; Murphey vs. United States (C.A.9), 179 F.2d 743; Pacific Portland Cement Co., vs. Food Machinery and Chemical Corp., (C.A.9) 178 F.2d 541; The Texas Co. vs. R. O'Brien and Co., Inc. (C.A.1), 242 F.2d 526; Orvis vs. Higgins (C.A.2) 180 F.2d 537; Senato vs. United States (C.A.2), 173 F.2d 493; Burman vs. Lenkin Construction Co., (C.A.D.C.) 149 F.2d 827; Aetna Life Insurance Company vs. Meyn (CAA8), 134 F.2d 246; Hazeltine Research vs. General Motors Corp. (CA6), 170 F.2d 6; Sbicca-Del Mac vs. Milius Shoe Co., (CAA8) 145 F.2d 389.

III.

APPELLANT C. H. ELLE CONSTRUCTION COMPANY WAS AFFORDED PRIMARY INSURANCE COVERAGE UNDER OMNIBUS CLAUSE OF APPELLEE'S POLICY

Under the insurance policy of the Western Casualty and Surety Company, and under "insuring agreements," Paragraph III is as follows:

> "With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission * * *"

This is the modern standard so-called "omnibus clause." Its purpose is to extend the protection of the polciy to any person or persons coming within the defined group. It gives the insured power to bring within the protection of the policy a third person using the insured automobile with the permission of the named insured. Such person, while using the automobile within the provisions of the omnibus clause, becomes an additional insured by virtue of the clause, as if he were named as an insured in the policy. This so-called additional insured has the protection of the coverage of the policy and the insurance as to him becomes an independent liability;

that is, independent of the insurer's responsibility to the named insured. The rights of the parties are the same as if the operator had been a named insured. Under this type of clause, therefore, M. Burke Horsley and his employer, C. H. Elle Construction Company, if qualified under the "omnibus clause" as additional insureds, stand in exactly the same situation as if they had been the named insured, and the other provisions of this policy are available for their protection.

The so-called "omnibus clause" has been construed and considered numerous times by the courts. In 5-A Amer. Juris. 88, Automobile Insurance, Section 90, it is stated as follows:

> "Automobile liability insurance policies ordinarily contain a so-called 'omnibus clause,' providing that the term 'insured' includes the named insured and also any other person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the insured or with his permission. Policies containing such clauses have been held to be valid, and it has been held in a number of cases that the 'omnibus clause' is not ambiguous."

In Section 91 of the same citation, it is stated:

> "In the absence of eccentricities of form, it is clear that an 'omnibus clause' creates liability insurance in favor of one other than the named insured, answering the descriptions of persons therein contained. Such a person other than the named insured, while using the

> motor vehicle for the purposes for which it is insured, and within the scope of the permission granted, becomes an 'additional insured' by virtue of the 'omnibus clause' the same as if he were named as an insured in the policy. Upon the happening of an accident while the insured motor vehicle is being operated by a qualified additional insured with the permission of the owner, the insurance as to him becomes an independent liability—that is, independent of the insurer's responsibility to the named insured; and the rights of the injured person are the same as if the operator had been a named insured."

In 5 Amer. Jur. 804, Sec. 532, it is stated:

> "Independently of the general insuring clause in an automobile liability policy, ofttimes there appears, * * * a clause purporting, or the effect of which it, to extend the protection of the policy to any person or persons coming within a defined group. This is the so-called 'omnibus' clause."

And in Section 533 of the same citation, it is stated:

> "* * * In the absence of eccentricities of form, it is clear that such a clause creates liability insurance in favor of one other than the named assured answering the description of persons therein contained."

The appellants herein are not concerned with fastening imputed liability on the owner of the vehicle, William S. Gagon. They do not seek to be the beneficiaries of any statu-

tory-created liability. The appellants seek to apply the policy language as a source of financial discharge of C. H. Elle Construction Company's liability to the persons injured through the negligence of the employee of the C. H. Elle Company. The matter of the owner's imputed liability involved in the State Court action is not involved here: the question of the operator's coverage under the owner's policy was not involved in the State Court case of Campbell, et al vs. C. H. Elle, et al but is the basic question involved herein. It is submitted, therefore, that the only consideration in this matter is the construction of the "omnibus clause" and whether or not the facts herein bring the employee of C. H. Elle Construction Company within the coverage of said policy.

In Crompton vs. Lumberman's Mutual Casualty Company, (Mass.) 129 N.E.2d 139, the Court in discussing generally the "omnibus clause," on Page 140 states as follows:

> "The policy was not limited to indemnifying the named insured for damages caused by his operation of the motor vehicle or by one, like his servant or agent, for whose action he might be liable at common law, but it provided indemnity for those whose operation of the automobile with the consent of the named insured had caused injuries to others."

And on Page 142, the Court says:

> "We think, that, on the allegations contained in the declaration when read with the terms and conditions of the policy, the plaintiff upon the occurrence of the accident to Hansen was entitled to the

same protection by virtue of the permissive use given to him by his father as the latter would have had if he had been operating the automobile at the time of the accident. Lahti vs. Southwestern Automobile Ins. Co., 109 Cal. App. 163, 292 P.527; Century Indemnity Co. vs. Norbut, 117, N.J. Eq. 584, 177 A. 248, affirmed 120 N.J.Eq.337, 184 A. 822; MacClure vs. Accident & Casualty Ins. Co., 229 N.C. 305, 49 S.E.2d 742; State Farm Mutual Automobile Ins. Co. vs. Arghyris, 189 Va. 913, 55 S.E. 2d 16; Appleman Insurance Law & Practice, Sec. 4354. The plaintiff is entitled to be relieved from liability to pay the judgment recovered by Hansen to the same extent as if the action had been brought against the insurer by the named insured."

In Pleasant Valley Lima Bean Growers vs. Cal-Farm Insurance Co., 298 P.2d 109 (Calif.) (1956) it is stated in Syllabus No. 8 as follows:

> "Omnibus clause in automobile liability policy extending protection as additional insured to any person while using insured vehicle and any person or organization legally responsible for use thereof, provided that such use was with named insured's permission, did not intend that extended coverage should be limited only to other users of insured vehicle whose negligence would be imputed to named insured under permissive use statute."

While this question has not been met directly by the

courts of the State of Idaho, there is the statement in the case of Leach vs. Farmers Automobile Inter-Insurance Exchange, 70 Idaho 156, 213 P.2d 920, where Syllabus No. 1 is as follows:

> "Under Policy providing that term 'insured' includes any person while using automobile and any person or organization legally responsible for use thereof provided actual use of the automobile is with permission of named insured, son of insured using automobile with permission was an 'insured'', and wife having become legally responsible for use of automobile by signing an application for driver's license for son was also an 'insured'."

In the case of New vs. General Casualty Company of America, 133 Fed. Supp. 955, the Court states as follows:

> "The law of the state of Tennessee is that both a named insured and an additional insured are entitled to protection against a liability and the insurer has obligated himself absolutely and unconditionally to pay judgments against either. Associated Indemnity Corp. vs. McAlexander, 168 Tenn. 424, 79 S.W.2d 556."

The Court further concludes:

> "It was not intended by the contracting parties that the omnibus clause could be used to decrease the protection of the insurance protection afforded the named insured by the policy. The omnibus clause

> or definition of insured merely causes the insurance to cover persons other than the named insured. This clause creates liability insurance in favor of another and places no limitation on the protection purchased by the named insured."

In Chatfield vs. Farm Bureau Mutual Auto Ins. Co., 208 F.2d 250, Syllabus 1 is as follows:

> "Generally, an 'omnibus clause' in an automobile liability policy should be construed liberally in favor of the insured and in accordance with the spirit of the clause to protect the public when an automobile is driven by one other than the insured owner."

In the case at bar, it is admitted and is without question that M. Burke Horsley was an employee of C. H. Elle Construction Company. It is clear, as is also brought out in the various answers which were filed thereto (Stipulation, Exhibits numbered "A", "C" and "C-1", (R. 153-176) that the liability of the C. H. Elle Consrtuction Company is that of a "master" or a "principal". The C. H. Elle Construction Company was, therefore, an organization legally responsible for the use of the vehicle in that the use of the vehicle was being controlled by its own employee.

In 5-A Amer. Juris. 90, Automobile Insurance, Sec. 92, it is stated as follows:

> "The usual omnibus clause in an automobile liability policy is expressly made to apply to any

> person or organization 'legally responsible' for the use of the vehicle while the same is being used with the permission of the named insured. Ordinarily a person operating the car is 'responsible', or 'legally responsible,' 'for the operation' of the same, within the meanning of the omnibus clause. Furthermore, the parent of a person driving the car at the time of the accident, who, by signing his application for an operator's license, was made responsible by statute for damages caused by the car while it was driven by him, and against whom judgment was recovered on account of the accident, was a person 'legally responsible for the operation thereof,' within the meaning and effect of a clause of this character. The same result was reached as to an employer of the person who being then engaged in the conduct of the former's business, was driving the car at the time of the accident, on account of which judgment was recovered against such employer."

See also the case of Leach vs. Farmers Automobile Inter-Insurance Exchange, 70 Ida. 156, 213 P.2d 920; Oden vs. Union Indemnity Co. 286 Pac. 59 (Wash.)

It has, furthermore, been held in numerous cases that under situations like the case at bar where the truck owner had a policy of insurance with an "omnibus clause" and the employer of the driver of the truck had multiple-coverage policy or general insurance, that the coverage provided by the "omnibus clause" was primary and that insurer was liable.

In the case of Pleasant Valley Lima Bean Growers vs. Cal-Farm Ins. Company, 298 P.2d, 109, it is stated in Syllabus 11 as follows:

> "Where injury to truck driver was allegedly caused by negligence of warehouse owner's employee while assisting in unloading lima beans from truck into warehouse pit, and truck owner had automobile liability policy with omnibus clause and warehouse owner had public liability policy covering warehouse operations at time of the accident, obligation of insurer under automobile liability policy to defend personal injury action against warehouse owner and employee as additional insureds and to pay judgment therein was primary to obligation of insurer under the public liability policy."

In the above case, the 'omnibus clause" of the truck owner (Brucker) was held to include loading and unloading of the truck. The injured person was injured during the process of loading and unloading the truck. One Nungaray was injured and brought his action against the Pleasant Valley Lima Bean Growers Assn. and its employee, Croker; upon service of this Complaint, the United States Fidelity and Guaranty Company, who carried general liability insurance on the Pleasant Valley Lima Bean Growers Assn., took over the defense of the action on behalf of Pleasant Valley and Croker. Counsel for United tendered their defense of the Nungaray action to defendant (Cal-Farm) therein, but Cal-Farm refused to defend, denying any coverage under its policy with Brucker, the truck owner.

On Page 114, the Court states as follows:

> "It remains to be determined whether defendant's obligation to defend the Nungaray action and to pay judgment therein is primary to the obligation of United, plaintiff's insurer, or whether defendant is justified in arguing that both insurance companies must bear these expenses pro rata as concurring insurers. We are of the view that defendant's liability is primary to United and that United has liability secondary to that of defendant. * * * As the truck involved in the accident was owned by Pleasant Valley, United's insured, United's policy is excess insurance as to Pleasant Valley, and Cal-Farm's duty to defendant Pleasant Valley and pay judgment in the Nungaray action is primary to the obligation of United."

It is submitted, therfore, that under the wording of the "omnibus clause" in the policy of the Western Casualty and Surety Company, if M. Burke Horsley qualifies as an additional insured, than and in that event the Western Casualty and Surety Company had the obligation and the contractual duty to provide the defense of M. Burke Horsley and his employer, C. H. Elle Construction Company, and to pay any verdicts or liability assessed by suit against them.

As shown at R.75, the policy of insurance issued by the St. Paul Mercury & Indemnity Co. to C. H. Elle Construction Co. contained the following clause:

> "Other Insurance—No Insuring Agreement hereof shall apply to any loss if the Insured is, or would be but for the existence of such Insuring Agreement, insured against such loss under any other policy or policies, bond or bonds, except as respects any excess beyond the amount which would have been payable under any such policy or policies, bond or bonds, had such Insuring Agreement not been effective."

In other words, by force of the "omnibus clause" in the policy of Western Casualty & Surety Co., C. H. Elle Construction Company became as a named insured therein, and the coverage of the St. Paul-Mercury Indemnity Company was excess or secondary.

IV.

APPELLEE HAD DUTY TO ASSUME DEFENSE OF APPELLANT C. H. ELLE CONSTRUCTION COMPANY.

The Western Casualty and Surety Company had the duty to assume the defense of C. H. Elle Construction Company and M. Burke Horsley in the case of Campbell, et al, vs. Elle, et al. Under paragraph II of the insuring agreements of the Western Casualty and Surety Company's policy with William S. Gagon, it is provided as follows:

> "As respects the insurance afforded by the other terms of this policy under coverages A and B, the company shall:

> "A. Defend any suit against the insured alleging such injury, sickness, disease or destruction and seek-damages on account thereof, even if said suit is groundless, false or fraudulent. * * *"

It is to be noted that this paragraph uses the unqualified word "insured", which, under the definition in paragraph III therefore includes the named insured and includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. Therefore, it is submitted that the defendant-appellee in this action had the duty and the obligation under its contract to defend any suit against C. H. Elle Construction Company and M. Burke Horsley, even if the suit is groundless, false or fraudulent. This, we submit, cannot be avoided even if all other points are determined adversely to appellants.

It is undisputed in the facts herein that the Western Casualty and Surety Company refused to accept the defense of the above named individuals.

In 50 A.L.R.2d, Page 465, it is stated as follows:

> "It appears to be well settled that, generally speaking, the obligation of a liability insurance company under a policy provision requiring it to defend an action brought against the insured by a third party is to be determined by the allegations in such action."

This citation is supported by the citation of cases from Alabama, California, District of Columbia, Georgia, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington and Wisconsin. And, in the same annotation on page 468, it is stated as follows:

> "And in Lamb vs. Belt Casualty Co. (1955), 3 Cal. App. 2d 624, 40 Pac.2d 311, it was said that to determine whether the insurance company was obligated to defend an action brought against the insured, the language of the policy must first be looked to, and next the allegations of the complaint for damages against insured.
>
> "Similarly, it was stated in Ritchie vs. Anchor Casualty Co. (1955) 135 Ca.App.2d 245, 286 P. 2d 1000; 'The Draftsman of a complaint against the insured is not interested in the question of coverage which later arises between the insurer and insured. He chooses such theory as best serves his purposes; if it be breach of contract rather than negligent performance of contract, he chooses the former; if it be negligence rather than warranty, he alleges negligence; if he happens to choose warranty, it may be an express one or one implied. And when the question later arises under an insurance policy as to what the facts alleged in the complaint do spell,

—for instance, whether they aver an accident,— the complaint must be taken by its four corners and the facts arrayed in a complete pattern without regard to niceties of pleading or differentiation between different counts of a single complaint. And the ultimate question is whether the facts alleged do fairly apprise the insurer that plaintiff is suing the insured upon an occurrence which, if his allegations are true, gives rise to liability of insurer to insured under the terms of the policy'."

In 49 A.L.R.2d at Page 711, it is stated as follows:

"Thus, all the cases agree that where it is the insurer's duty to defend, and the insurer wrongly refuses to do so on the ground that the claim upon which the claim against the insured is based is not within the coverage of the policy, the insurer is guilty of a breach of contract which renders it liable to the insured for all damages resulting to him as the result of such breach."

The said citation cites cases from the United States, Alabama, Arizona, Arkansas, California, District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Vir-

ginia, Wisconsin and Canada.

The Idaho cases referred to are the cases of Coast Lumber Co. vs Aetna Life Ins. Co., 22 Idaho 264, 125 P.185 and Boise Motor Car Co. vs. St. Paul-Mercury Indemnity Co., 62 Idaho 438, 112. P.2d 1011.

In the case of Standard Surety and Casualty Co. of New York vs. Metropolitan Casualty Co. of New York, 67 N. E. 2d 634, Syllabus No. 3 is as follows:

> "Where automobile liability policy bound insurer to defend claims against insured and extended coverage to any organization legally responsible for use of automobile provided declared and actual use of automobile was pleasure and business or commercial, but insurer refused to defend personal injury actions against insured's employed for injuries allegedly caused by insured's negligent operation of his automobile in furtherance of employer's business, and another insurer which had issued a non-ownership liability policy to employer was compelled to conduct defense, employer's insurer was entitled to recover from employee's insurer expenses incurred in defending the action against employer."

In the case, one J. A. French and The United Insurance Company were sued by Hoskins and her husband. The petition alleged that French was an agent and employee of The United Insurance Company and that while acting in the course and scope of his employment he so negligently oper-

ated his automobile as to injure Mary F. Hoskins. The Metropolitan Casualty Ins. Co. had issued a policy to Mr. French, including an "omnibus clause." On page 635 the court says:

> "The contract of defendant by the policy it issued to French, bound it to defend any claim made against French, no matter how groundless, in which damages were claimed to have been sustained as a proximate result of his negligence in the operation of his automobile. The policy extended its coverage by the clause above quoted, to include: '* * * any person or organization legally responsible for the use thereof * * * provided declared and actual use of the automobile is "pleasure and business" or "commercial" * * *'."
>
> "It seems clear therefore that the plaintiff herein under the facts pleaded was entitled to the protection of the policy issued by the defendant to French (plaintiff's employee) under the provisions of the omnibus clause and the court was correct in overruling the defendant's demurrer, and the judgment, which was entered upon the defendant's refusal to plead to the issues presented by plaintiff's petition, must be sustained."

The Complaint in the case of Mary Lou Campbell, et al, vs. C. H. Elle, et al, state in paragraph V (R.154) that the defendants M. Burke Horsley and Max Larsen * * * were engaged as agents, servants or employees of the C. H.

Elle Construction Company and were at all times mentioned acting as such within the scope and course of their employment, and in Paragraph IV (R 154), that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon. It is clear, therefore, that under the allegations of the Second Amended Complaint in the case of Mary Lou Campbell, et al, vs. C. H. Elle Construction Company, et al, the C. H. Elle Construction Company and M. Burke Horsley were covered as additional insureds under the "omnibus clause." Therefore, under the ruling as set forth above that the obligation of the insurance company to defend is based upon the allegations of the Complaint that they were called upon to defend, we must then come to the only conclusion, that the Western Casualty and Surety Company had the obligation to provide the defense for the C. H. Elle Construction Company and M. Burke Horsley. Under the cases cited above, the failure of Western Casualty and Surety Company to so provide the defense makes them, therefore, liable for all damages suffered: that is, the Judgment obtained in the amount of $15,000.00, plus the costs thereof, together with the costs and expenses incurred for attorney's fees and additional expenses.

In 49 A.L.R.2d, beginning at Page 717, the cases and authorities are set out, showing under the circumstances outlined above the liability of the insurer when it refuses to accept the defense for the amount of the judgment, and on Page 721 the liability for insured's expenses incurred in defending the action, and on Page 727 the liability of the in-

surer for reasonable attorneys' fees incurred by the insured in defense of the action brought against him, and on Page 730 the liability of the insurer for court costs.

V.

USE OF INSURED TRUCK WAS WITH PERMISSION WITHIN MEANING OF THE POLICY

One of the principal questions to be determined in this case is whether the evidence shows that M. Burke Horsley, the person who was driving the Gagon's truck, and against whom judgment was obtained, was driving the insured vehicle with the permission of the insured within the meaning of the terms of the insurance policy. The "omnibus clause" included in the policy of the Western Casualty and Surety Company has been set forth above, and the facts as to the permission of M. Burke Horsley are contained in the Depositions before the Court.

On August 22, 1954, Horsley was driving the 1954 Chevrolet Truck owned by the Gagons. On that day, Mr. Horsley, according to his testimony, attempted to locate William Gagon and found that he was out of town fishing. He thereupon contacted Mrs. Jessie Gagon, the wife of William Gagon (R.137-138). Mr. Horsley contacted Mrs. William Gagon (Jessie Gagon) by telephone, finding her at her sister's. He asked her if he could borrow the vehicle, and she said "Yes." (R.109; R.137-138) After this telephone call, Mrs. Gagon met Mr. Horsley at the Gagon Lumberyard. Mrs. Gagon unlocked the Lumberyard door by keys that she had

in her possession (R.110), and gave Horsley the keys to the truck (R.111; 138-139).

In the testimony of both Mrs. Jessie Gagon and Mr. William Gagon, the fact is clear that after the date of the accident the Gagon Lumber Company forwarded a statement to the C. H. Elle Construction Company in the amount of $15.00 for the use of the truck, which was paid (R.111-112, 122). It is to be noted that the Deposition contains as Exhibits the statement of service in the amount of $15.00 to C. H. Elle Construction Company, as well as the ledger sheet showing the payment of said bill. This bill was forwarded to the C. H. Elle Construction Company under a bill dated October 6, 1954.

From the above testimony, several things stand out. It is to be noted that Mrs. Gagon did not hesitate nor refuse to loan the vehicle to Mr. Horsley. He definitely had the permission of Mrs. Jessie Gagon. She did not hesitate, on a Sunday, to go down to the Lumberyard, use her own keys to enter the Lumberyard, and give the vehicle plus the keys to Mr. Horsley.

The Gagon Lumberyard—Mr. and Mrs. Gagon—owned the vehicle involved in this controversy. It should further be noted that there was no discussion by Mrs. Gagon as to the payment for gas or oil or any other matters. This type of an arrangement could only come from long-standing mutual understandings.

In addition to the above, the testimony shows that Mr.

Gagon was in the company of M. Burke Horsley the day after the accident, and that they went by the scene of the accident. In view of this, the fact that Mr. Gagon at no time ever told Mr. Horsley that he did not have the permission of himself (Mr. Gagon) to use the vehicle is most significant. At no time was there ever any report made that the vehicle was used without permission, and it was never reported as missing.

It should also be noted that in October, 1954, approximately a month and a half after this accident, Mr. Gagon personally sent a bill, in his own hand-writing, to the C. H. Elle Construction Company for the rental value of this truck for the day of the accident. This bill was paid by the C. H. Elle Construction Company. It should be noted that the date of this bill, October 6, 1954, was prior to the institution of any suits in the State Court by Mrs. Campbell, prior to any suit in the Federal Court in the present matter, rior to any demands made by the C. H. Elle Construction Company or St. Paul-Mercury Indemnity Company that Western Casualty and Surety Company take over the defense in this matter.

One further point should be mentioned at this time. The S.R.21, Notice of Policy under Section 5 of the Idaho Motor Vehicle Safety Responsibility Act, a discussion of which will be set forth below, was dated October 5, 1954. We submit from the evidence set forth above that M. Burke Horsley was driving the insured vehicle with the permission of the insured within the meaning of the terms of the insurance policy.

In 5-A Amer. Juris. 92, Automobile Insurance, Section 94, it is stated:

> "The permission required to bring an additional insured within the protection of an omnibus clause may, as a general proposition, be express or implied, and the omnibus clause may expressly provide, or be required by statute to provide, that the permission of the named insured may be express or implied. Where the word 'permission' or 'consent' appears in the omnibus clause without definition, it is construed to include implied permission, and this implication may be a product of the present or past conduct of the insured. Implied permission is not confined alone to affirmative action, and is usually shown by usage and practice of the parties over a sufficient period of time prior to the day on which the insured car was being used. * * * Under some circumstances, however, even silence may be sufficient to show an implied permission; or it may not even be necessary that the owner be aware of the identity of the operator or know of the particular use being made of the vehicle at the time of the accident."

In 5 A.L.R.2d, 608, under an annotation on the omnibus clause, it is stated as follows:

> "While in many instances the omnibus clause expressly provides that the permission of the named insured may be express or implied, thus avoiding

any doubt in regard to this matter, the more common practice among insurers is not to refer specifically in the clause to the nature of the required provision. However, there can hardly be any doubt that the term 'permission,' even if standing alone, include as the word is used in the omnibus clause permission implied by the present or past conduct of the insured."

In the case of American Employers Insurance Company vs. Cornell, 73 N.E.2d 70, it is stated:

"Appellee's Complaint sought to recover against appellant on a policy of liability insurance issued by the appellant to one Dora Griffin. Appellee had previously recovered judgments against one Ollie P. Beal, whom it was claimed was driving the automobile described in appellant's insurance policy, which struck appellee's tractor, inflicting the damages and the injuries upon which said judgments were based. It was claimed that the said Ollie P. Beal was driving this automobile at the time of the accident with the permission of the insured, Dora Griffin, and that appellant became obligated to pay the judgments by reason of the terms of the policy.

"The consolidated causes were tried to a jury and the verdict was returned in favor of the appellee for $5,000.00 and $2,900.00, that being the amounts of the two original judgments against Beal, with interest, and judgment was rendered on the same."

And on Page 73, the Court states as follows:

> "It is entirely possible for a person to have the implied permission of another to use an automobile under certain circumstances without having the right to enforce such use against the person granting such implied permission by silence.
>
> "The word 'permission' involves leave and license, but it gives no right. Vol. 32, Words and Phrases, Permanent Ed., Page 158; Flaherty vs. Nieman, 1904, 125 Iowa, 546, 101 N.W. 280."

The case of General Casualty Company of America vs. Woodby, 238 F.2d. 452 (1956), on Page 456, it is stated:

> "It is not necessary that permission to use the insured automobile be given in express words. It may be implied from all the facts and circumstances surrounding the parties. Verzoles vs. Home Indemnity Co., D. C., 38 F.Supp. 455, 458, affirmed 6 Cir., 128 F.2d 257; Indiana Lumbermen's Mutual Ins. Co. vs. Janes, 5 Cir., 230 F.2d 500; Glens Falls Indemnity Co. vs. Zurn, 7 Cir., 87 F.2d 988. The directives upon which appellants rely were verbal directives, never reduced to writing. The evidence did not show any specific instance when they were called to the attention of Spradlin. He had been with the company only several months. Spradlin, in testify-

ing, was not asked about such instructions. He apparently thought he had the authority to let Fritts have the car. * * * Both Mr. Cooper and Mr. Cheatham, when questioned about the matter after the accident, stated that Fritts was entitled to use the car for whatever purpose he wanted to. This was because in their opinion Fritts had purchased the car and was the owner of it. Even though they were wrong in their legal conclusions it shows that at the time of the accident, and thereafter when all the facts were known by them, they made no objection to Spradlin's actions in the matter and apparently acquiesced in his delivery of the Mercury to Fritts. The company continued to maintain this position until as late as September 17, 1954, when the company's attorneys, at the direction of Mr. Cheatham, wrote the garage that the company had no claim to or interest in the Mercury. * * * We think these facts were sufficient to take the case to the jury on the authority of Spradlin to give Fritts permission to use the car. United Services Automobile Assn. vs. Preferred Accident Ins. Co., 10 Cir., 190 F.2d 404, 406; Stoll vs. Hawkeye Cas. Co., 8 Cir., 193 F.2d 255, 260."

In the case of American Fidelity and Casualty Company vs. Pennsylvania Casualty Co., 97 Fed. Supp. 965, it is stated as follows:

"The question turns upon the meaning of the

phrase 'with the permission of the named insured.'

"Permission in such a case is treated as being 'consent, expressed or implied'. Traders and General Insurance Co. vs. Powell, 8 Cir., 177 F.2d 660, 663."

"In Stovall vs. New York Indemnity Co., 157 Tenn. 301, 8 S.W.2d 473, 477; 72 A.L.R. 1368, the Supreme Court of Tennessee said: 'It is our opinion that the words "providing such operation is with the permission of the named insured" were intended to exclude from the protection of the policy a person who should take the automobile and use it without authority in the first instance'."

In the case of Lanfried vs. Bosworth, 114 P.2d 406 (Calif.) it is stated on Page 407 as follows:

"In determining whether defendant Davis was driving the automobile with the consent of defendant Bosworth, the Court was confronted with the presumption that defendant Davis was innocent of crime or wrong. This presumption is sufficient to support a finding that defendant Davis operated the car with the consent of defendant Bosworth. Indeed, no contrary finding could be supported by the evidence. The Code section provides that the presumption is 'satisfactory' unless controverted by other evidence, but no other evidence was prsented to the court. In Prickett vs. Whapples, 10 Cal. App.

2d 701, 52 P.2d 972, 973, it was held that 'the presumption arises that one operating the automobile of another has the necessary consent to make his act lawful'."

In the case of Prickett vs. Whapples, 52 P.2d 972, it is stated on page 973 as follows:

> "The law makes the temporary use of an automobile, without the owner's consent, a misdemeanor; hence the presumption arises that one operating the automobile of another has the necessary consent to make his act lawful (Code Civ. Proc., s 1963, subd. 33). Such inference and presumption, may be overcome and are overcome when there is sufficient evidence to the contrary. We do not undertake to state generally what evidence would be sufficient to overcome them. Each case must be judged upon its own facts."

In the case of Brochu vs. Taylor, 269 N.W.711 (Wisc.), Syllabus 1 is as follows:

> "Under automobile liability policy containing omnibus clause covering anyone using automobile with the permission of insured, or adult member of his household, express permission need not be proved to render insurer liable, it being sufficient if facts reasonably tend to show that automobile was being used with implied permission of the insured."

In addition to the above facts which we submit show an

implied permission and also show a complete acquiescense in the activity of Mr. Horsley by Mr. Gagon, is the fact that Mrs. Jessie Gagon was the wife of the named insured, William Gagon, assisted in the operation of the business, and that presumptively the business was community property and, as Mrs. Gagon herself testified, "We owned the truck."

On the question of whether or not a wife may be the agent of her husband, the case of Carron vs. Guido, 54 Ida. 494, 33 P.2d 345, states as follows, page 347 of Pacific Reports:

> "The evidence shows respondent's wife waited on customers and made sales of merchandise in the store, prior to the sale to the boys, and, on some occasions, she did so in the absence of her husband. It is true the fact she was his wife does not show she was his agent in making the sale to the boys, nor does it show she was not. A husband may constitute his wife his agent and render her acts, within the scope of her apparent authority, binding on him. * * *
>
> "It is not necessary to establish agency by the production of a contract, or other direct proof, but it may be inferred from all the facts and circumstances in evidence, including the conduct of the parties, and when, as in this case, the evidence tends to show agency existed, the question of whether it did or not is for the jury. Amonson vs. Stone, 30 Idaho, 656, 167 P.1029; Madill vs. Spokane Cattle Loan Co., 39 Idaho, 754, 230 P.45; Flaherty vs. Butte

> Electric R. Co., 43 Mont. 141, 115 P.40; Houston vs. Keats Auto Co., 85 Ore. 125, 166 P. 531; Dibble vs. San Joaquin Light & Power Co., 47 Cal. App. 112, 190 P.198; Reed vs. Anderson, 127 Ok. 64, 259 P. 855."

And in McShane vs. Quillan, 47 Ida. 542, 277 P.554, Syllabus 2 is as follows:

> "Husband ratifying wife's acts and participating in benefits accruing therefrom, with knowledge of alleged fraudulent representation by her to one for whom they acted as agents in renting and disposing of realty, would be equally liable with her for alleged fraud."

In the case of Spegeman vs. Vandeventer, 135 P.2d 186, (Calif.), Syllabus No. 6 is as follows:

> "A husband or a wife may act as agent for the other, and such agency may be proved by circumstantial as well as by direct evidence."

Syllabus No. 7 is as follows:

> "Much less proof is required to establish agency of one spouse for the other than in other cases."

Syllabus No. 8 is as follows:

> "An agency of one spouse for another may be established by proof of ratification of acts already performed without previous authority."

In the case of Chatfield vs. Farm Bureau Mutual Auto Ins. Co., 208 F.2d 250, 4 Cir. (1953), the court on Page 256 states as follows:

> "Our own decisions, we think, show a strong tendency toward a liberal interpretation, in favor of the insured, of the 'omnibus clause.' This clause should not be construed and applied, from a purely analytical viewpoint, under a literal interpretation of the words of the policy. The spirit, not the letter, should control. * * *"

In the case of Ford vs. Kann Sons Co., 76 A.2d, 358, Syllabus No. 2 is as follows:

> "A wife by her relationship alone has no power to act as agent for her husband but relationship is of such nature that circumstances which in the case of strangers would not indicate creation of authority or apparent authority may indicate it in case of husband and wife."

Syllabus No. 4:

> "Whether husband by his acts gave his wife, so far as plaintiff was concerned, apparent authority to pledge husband's credit for purchases, was for jury under evidence that husband and wife had joint checking account, that husband supplied money that went into account, that husband examined checkbook from time to time and saw that wife had drawn

checks to plaintiff, and that account ran for approximately one year prior to time wife allegedly deserted husband."

In the case of Croft vs. Malli, 105 A.2d 372 (Penn.), on Page 376 the Court states:

"* * * In the Restatement of Agency, sectoin 22, comment (b), cited with approval in Sidle vs. Kaufman, 345 Pa. 549, 29 A2d 77, 81, it is stated: 'Neither husband nor wife by virtue of the relationship has power to act as agent for the other. The relationship is of such a nature, however, that circumstances which in the case of strangers would not indicate the creation of authority or apparent authority may indicate it in the case of husband or wife. Thus, a husband habitually permitted by his wife to attend to some of her business matters may be found to have authority to transact all of her business affairs.' In Mifflin County Riding and Driving Ass'n vs. Western Mut. Fire Ins. Co. or Urbanana, Ohio, 376 Pac. 157, 160, 161; 101 A.2d 683, 684, it was stated: ' "It is a well established principle that whatever evidence has a tendency to prove an agency is admissable even though it be not full and satisfactory, and it is the province of the jury to pass upon it. 'Direct evidence is not indespensible—indeed, frequently is not available—but instead circumstances may be relied on, such as the relation of the parties to each other and their conduct with reference to the subject matter of the contract'."

In Gregory v. Fassett, 116 A.2d 304 (Pa.), Syllabus No. 5 is as follows:

> "Where wife admittedly acted for husband in entering into loan agreement for purchase of restaurant, and executed a judgment note with provision for confession of judgment therein, and husband who had knowledge of his wife's action's, voiced no objection nor took any contrary action, subsequent confession of judgment on note was binding on husband as well as wife.

Syllabus No. 6:

> "An affirmance of an authorized transaction by agent may be inferred from failure to repudiate it."

In Engle vs. Farrell, 171 P.2d 588 (Calif.) Syllabus No. 3 is as follows:

> "A husband or wife may act as agent for the other and the agency may be proved by circumstantial as well as by direct evidence."

Syllabus No. 4:

> "In establishing fact of an agency between husband and wife, less evidence is required to establish the agency than in other cases and it may be established by proof of ratification of act already performed without previous authority."

It is submitted that the facts in this case come squarely

within the cases cited above and show that M. Burke Horsely had the implied permission of the insured. in that his wife acted as his agent in his absence, and show ratification of the acts of Mrs. Gagon. It should be noted that nowhere in the testimony is there any denial of Mrs. Gagon's right to loan the vehicle as she had loaned it. It is true that testimony is in the record that Mr. Gagon did not affirmatively tell Mrs. Gagon she had the right to loan the vehicle, but as is pointed out in the cases above, the question of permission is not that of an affirmative right but no affirmative denial of the right to do the act.

In Skut v. Hartford Accident and Indemnity Co., 114 A.2d 681 (Conn.) on Page 683 the Court states as follows:

> "The court concluded that Pugatch's liability to the plaintiff was covered by the policy. The correctness of that conclusion depends upon whether the court was warranted in finding that the actual operation of the car at the time the plaintiff's decedent was injured was with the permission of Mrs. Boardman. This latter finding is attacked by the assignment of errors. The evidence before the court on this subject was the same as the evidence on the former trial. In the former trial this evidence led the jury to the conclusion that at the accident Pugatch was operating the car as the agent of the Boardmans and in the course of his employment by them as a taxi driver. It is, of course, true that this finding of agency in the former trial is not conclusive on the defendant

> in this case to establish coverage under its policy. Rochon v. Preferred Accident Ins. Co., Conn., 190, 194, 71 A. 429."

In the case of Hamm v. Camerota, 290 P.2d 713 (Wash.), Syllabus No. 3 is as follows:

> "Judgment in action against driver of automobile and owners thereof, determining that driver was liable for injuries caused but that owners were not so liable, was not res judicata of issue whether driver had had owner's permission to drive automobile when accident occurred, and did not preclude recovery against owners' liability insurer under omnibus clause."

It is submitted that under the factual situation involved in this action, that M. Burke Horsely had permission to drive this vehicle. It is certainly clear that he was granted the right to use the car and the keys were turned over to him. It is submitted that from the facts and the law cited above the permission of Mr. Burke Horsely was such a permission as comes within the omnibus clause of this policy.

VI.

APPELLEE HAS ADMITTED IT'S POLICY INSURED APPELLANT

The record before the court in this case, we submit, contains a direct admission by the appellee that their policy covered the operator of this vehicle, M. Burke Horsely. The

S.R.21, Notice of Policy under Section 5 of Idaho Motor Vehicle Safety Responsibility Act, a copy of which is before the Court (R.58-59) and by the Stipulation set forth as a genuine copy of the instrument on file with the Commissioner of Law Enforcement, State of Idaho (R. 151), identifies the date of the accident, the location, that it was a 1954 Chevrolet 6-wheel 2-ton Truck, Serial No. X54F018590 that was involved in an accident with one Arnold Campbell. The S.R.21 goes on to state that the vehicle was operated by one M. Burke Horsely, Soda Springs, Idaho, and owned by William S. Gagon, Soda Springs, Idaho, and that the company signing said Notice states that its policy No. UI518973 issued to William S. Gagon, Soda Springs, Idaho, covered the above named owner and also applied to the above named operator. This S.R. 21 was signed as follows: "The Western Casualty and Surety Company, Fort Scott, Kansas by A. W. Kay, Secretary, American Agencies, Inc., General Agents." We submit that this is a direct admission that M. Burke Horsely was covered by this policy. This S.R.21 was submitted by the General Agents of the Western Casualty and Surety Company, signed by the said Agency and forwarded to the Department of Law Enforcement, State of Idaho, pursuant to statute. There is nothing in the record to controvert the authority of the General Agent, to controvert the signature of A. W. Kay or to in any way destroy the force and effect of this admission. This S.R. 21 is required by statute and the statute of the State of Idaho, of which the Federal Court, of course, takes judicial notice, is to the effect that any person who without authority should sign such a notice shall be

deemed guilty of misdemeanor. It is, and must be, assumed that Mr. A. W. Kay was not guilty of a misdemeanor.

In the case of Behringer vs. State Farm Mutual Automobile Insurance Company, 82 N.W.2d 915, the Court discusses the effect of an insurer filing the S.R.21 Form under the Safety Responsibility Law. Syllabus No. 1 is as follows:

> "Where an insurer has through an authorized officer, employee or agent filed an SR-21 form for purpose of complying with Safety Responsibility Law, insurer cannot thereafter deny liability upon policy because of any act occurring, or fact existing, as of the time of such filing which it then knew or could have known through the exercise of due diligence."

Syllabus No. 2 is as follows:

> "Where an insurer has through an authorized officer, employee or agent filed an SR-21 form under the Safety Responsibility Law, insurer has conclusively certified that under the facts then existing its policy insured both the named owner and the operator of the particular vehicle described in the form as to which the same was filed."

Syllabus No. 3 is as follows:

> "Where insurer filed an SR-21 form under Safety Responsibility Law showing coverage of both the named owner and operator of the vehicle involved in accident, it was thereafter precluded from

denying coverage on ground that driver of vehicle was operating same without a valid license, or that liability of additional insured arose by contract within meaning of policy excluding coverage in such cases, since such facts could have been established by insurer using due diligence before filing of form. W.S.A. 85.08(7), 85.08(9) (c)."

And on Page 918 the Court states as follows:

"We are therefore constrained to hold that, when a company has through an authorized officer, employee, or agent filed an SR-21 with the commissioner for the purpose of complying with the Safety Responsibility Law, the company cannot thereafter deny liability upon its policy because of an act occurring, or fact existing, as of the time of such filing, which it then knew, or could have known through the exercise of due diligence. In other words, the legal effect of filing an SR-21 under such circumstances is to conclusively certify that under the facts then existing its policy insured both the named owner and the named operator of the particular vehicle described in the SR-21 as to which the same was filed."

VII.

DAMAGES

It is submitted that in this case if the Appellate Court

should find that the appellants are entitled to recovery, then the amounts of damages are fixed. It is agreed that the Judgment against C. H. Elle Construction Company and M. Burke Horsley in the State Court amounted to $15,000.00 plus Court costs awarded in the amount of $371.40. (Plaintiffs' Request for Admissions II-G (R.47-48) and Response of Defendant thereto (R.61).

It is further admitted, pursuant to paragragh III-B of the Stipulation (R.151) that amounts paid for attorneys fees for the defense of C. H. Elle Construction Company and M. Burke Horsley and Max Larsen amounted to $1,-500.00 and that said attorneys expended $139.53 for costs. The attached statement regarding the costs indicates that said costs were necessary in defending the action, being filing, appearances, long distance telephone calls, witness fees advanced and traveling expense in investigation. These amounts, then, are fixed.

The policy of Western Casualty and Surety Company set forth policy limits. These policy limits are for bodily injury liability to one person $10,000.00 and property damage liability in the amount of $10,000.00 for each accident (See policy No. UI518973, (R.51-55). In Exhibit "A" attached to the Stipulation (R.153-159) it is noted that the demands of the plaintiff in the State Court consisted of demands for damages arising from the death of Mr. Campbell in the amount of $100,000.00 and, in the Third Cause of Action thereof, damages in the amount of $1,620.00 for property damage to the automobile. From the verdict of the

jury, Exhibit "D" attached to the Stipulation, (R.177) it is noted that the verdict was in the sum of $15,000.00 embracing all causes of action. Therefore, it must be assumed that all causes of action were considered and that the $15,000.00 includes the $1,620.00 property damage claimed, as well as claims for personal injury.

There is, therefore, the amounts of $10,000.00, personal liability, $1,620.00 property liability, making a total of $11,620.00, plus $371.40 court costs expended in the defense of the action; in addition to which there is $1,500.00 attorneys' fees, plus other expenses of $139.53. This makes a grand total of $13,630.93.

The Supplemental and Amended Complaint does pray for $13,259.53, plus costs incurred herein, but it further asks for such other and further relief as to this Honorable Court may seem meet and equitable in the premises. The proof will show a total of $13,630.93, and it is submitted, therefore, that such figure is the figure to be awarded the appellants in this action.

CONCLUSION

It is submitted that each and every material allegation of appellants Amended and Supplemental Complaint in this matter has been proven. The Western Casaulty and Surety Company issued a policy to William S. Gagon, and by its terms the driver of the vehicle, if he be driving with permission of the named insured, is an also insured and is entitled to all of the protection and contractural obligations set forth

in said policy. It is unquestioned that M. Burke Horsley, as an employee of C. H. Elle Construction Company, a corporation, was operating the vehicle covered by this policy when he was involved in a collision, the end result of which amounted to a judgment being rendered against the said M. Burke Horsley and C. H. Elle Construction Company in the amount of $15,000.00 plus costs. It is submitted that under the facts set forth in this record that the implied permission of Jessie Gagon to allow M. Burke Horsley to use this vehicle cannot be disputed, and, in addition to this, there is the absolute and undenied acquiescence of Mr. Gagon in the conduct of his wife in that at no time after learning of the exact situation did he ever deny the permission, but by his conduct expressly acquiesced therein.

It is submitted, therefore, that Judgment should be rendered for and on behalf of the appellants in this action against the Western Casualty and Surety Company for the total sum of $13,630.93, plus interest, and costs of this action.

Respectfully submitted,

A. L. MERRILL
R. D. MERRILL
W. F. MERRILL

Attorneys for Appellants

Residence: Pocatello, Idaho

APPENDIX

EXHIBITS

Exhibits	Identified	Offered	Received
Plaintiffs Exhibit A	R112	R114	R152
Defendant's Exhibit 1	R116		
S. R. 21	R58-59		3105, 151

Exhibits Attached to Stipulation:

Exhibit	Identified	Offered	Received
Exhibit A	R153		R153
Exhibit B	R159		R159
Exhibit C	R166		R166
Exhibit C-1	R172		R172
Exhibit D	R177		R177
Exhibit E	R177		R177
Exhibit F	R40-41		R40-41
Exhibit G	R179		R179

No. 15932

IN THE

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FOR THE NINTH CIRCUIT

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a corporation and
ST. PAUL-MERCURY INDEMNITY CO.,
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Appellants,

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WESTERN CASUALTY AND SURETY COMPANY,
a corporation,

Appellee.

Brief of Appellee

Appeal from the United States District Court for the District of Idaho, Eastern Division

FILED
JUL 21 1958
PAUL P. O'BRIEN, CLERK

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Appeal from the United States District Court for the District of Idaho, Eastern Division

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SUBJECT INDEX

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No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO.,
a corporation and
ST. PAUL-MERCURY INDEMNITY CO.,
a corporation,

Appellants,

vs.

WESTERN CASUALTY AND SURETY COMPANY,
a corporation,

Appellee.

Brief of Appellee

STATEMENT OF CASE

The defendant, Western Casualty and Surety Company, a corporation, issued its liability policy to William S. Gagon, Soda Springs, Caribou County, Idaho, describing therein a certain 1954 Chevrolet truck. The policy is described as UI-518973. The occupation of the named insured, William S. Gagon, in the policy is decribed as "Lumber Business, Builder, Hardware Dealer, Self, Soda Springs." The policy

of insurance contained the usual "omnibus clause" which reads as follows:

> "With respect to the insurance for bodily injury liability and for property damage liability, the unqualified word 'insured' includes the named insured and also includes any person while using the automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission." (R. 52).

The policy was issued for commercial purposes as shown by the policy. The purposes for which the automobile was to be used are commercial-Class 5CA. Paragraph 5CA of the policy in question states:

> "The term 'commercial' is defined as use principally in the business occupation of the named insured as stated in Item 1 (Item 1 says: Lumber Business, Builder, etc.) including occasional use for personal pleasure, family and other business purposes." (R. 52).

At a time when this policy was in full force and effect, and on or about the 22nd day of Auguist, 1954, an agent and employee of the plaintiff, C. H. Elle Construction Company, while acting in the line, course, and scope of his employment as an agent for C. H. Elle Construction Co., went to the place of business operated by Mr. Gagon, the named

insured in the policy above referred to, to borrow the Chevrolet truck described in said policy of insurance. Mr. Gagon, the named insured in the Western Casualty policy, was not available. M. Burke Horsley, the agent of C. H. Elle Construction Co., one of the plaintiffs herein, then sought permission to borrow the truck from Jessie Gagon, wife of William S. Gagon, the named insured. Jessie Gagon gave the keys to the truck to M. Burke Horsley, and he drove away in the business of C. H. Elle Construction Co. While he had possession of the truck under these circumstances, he was involved in an automobile accident, as a result of which accident the husband of Mary Lou Campbell and the father of Terry Ray Campbell and Curtis Howard Campbell was killed. The heirs of Arnold Campbell brought a suit in the District Court of the Fifth Judicial District, in and for the County of Bannock, State of Idaho, against the C. H. Elle Construction Co., M. Burke Horsley, the agent of C. H. Elle Construction Co., and William S. Gagon. The plaintiffs in the State Court predicated the liability against William S. Gagon upon the theory that M. Burke Horsley was using the truck belonging to Gagon with the latter's permission (as provided for predicating liability under the owners liability statute in Idaho). (R. 154). In the State Court action judgment was rendered in favor of the plaintiffs against C. H. Elle Construction Co., and against M. Burke Horsley, an employee of C. H. Elle Construction Co. Defendant Larsen was granted a non suit. Judgment in that action was entered in favor of William S. Gagon upon the finding that the truck referred to in the Western Casualty policy was not being

used with the permission of William S. Gagon, the named insured, so as to be a basis for owner's liability. (R. 40).

In the amended complaint of the plaintiffs in the State Court action, and in paragraph 4 thereof, it is alleged that the truck operated by Horsley was being operated by him with the permission and consent of the named insured, William S. Gagon (R. 154). In the answer of the defendant Gagon it was expressly denied that the truck was being used with his permission and consent. (R. 160). In the answer of C. H. Elle Construction Co., filed by Merrill and Merrill it is admitted that Gagon was the owner of the truck, but each and every other allegation in said complaint was denied, which is a denial that the truck was being operated with the consent of the said William S. Gagon. (R. 168). In the answer of M. Burke Horsley in the State Court action it was admitted that William S. Gagon was the owner of the 1954 Chevrolet truck, but it was denied that the truck was being operated with the permission and consent of the said William S. Gagon. (R. 173). Thus the issue of whether or not the truck was being operated with the consent of William S. Gagon was squarely put. The appellant herein, St. Paul Mercury and Indemnity Company, had written liability insurance for C. H. Elle Construction Co., which policy inured to his benefit, and counsel, namely, Merrill and Merrill, tried the case in the State Court for St. Paul Mercury and Indemnity Company. Under these circumstances, opportunity to try the issue of permissive use was available to the appellant herein, and that issue was tried and resolved in favor of William S. Gagon, the judgment reflecting that

the truck was not being used with the permission and consent of Gagon. (R. 40-41).

In order to find for the plaintiff in the State Court action and against C. H. Elle Construction Co. and M. Burke Horsley, it was necessary for the jury to have found that M. Burke Horsley was operating the truck negligently and that at the time of the accident he was an agent, servant, or employee of the defendant C. H. Elle Construction Company and was acting in the line, course, and scope of his employment. To have found favorably to Gagon in the State Court action, it is imperative that the jury find that Horsley was not using the truck with the permission of Gagon. The Appellants herein at the time the State Court action was tried could have admitted insofar as C. H. Elle Construction Co. and M. Burke Horsley are concerned that the truck was being operated with the permission of William S. Gagon. This they did not admit, but, on the contrary denied.

The judgment in the State Court action where Mary Lou Campbell, et al, were plaintiffs and C. H. Elle Construction Co., a corporation, M. Burke Horsley, and Max Larsen, and Gagon were defendants, was paid by the appellant herein as the insurance carrier of C. H. Elle Construction Company. Judgment in the amount thus paid, plus some costs and attorney fees, is sought in the instant action against Western Casualty and Surety Company upon the theory that C. H. Elle Construction Company and M. Burke Horsley became an additional insured under the policy of the Western Casualty Company, and said company under the policy

was obligated to defend the State Court action and pay on behalf of C. H. Elle Construction Co. and M. Burke Horsley any judgment recovered (R. 19 and 20).

The facts of the instant case were submitted to the trial court upon stipulation, request for admissions, and depositions of William S. Gagon, M. Burke Horsley, C. H. Elle and Jessie Gagon. (R. 61-102, inclusive).

SUMMARY

The defendant, Western Casualty and Surety Company, appellee herein, defended the suit in the United States District Court and raised the following questions in defense thereof.

FIRST: That the issue of whether or not the Chevrolet truck owned by Gagon was being operated with his permission, i. e., the permission and consent of the named insured, had already been decided in the State Court action and that that issue cannot be again tried in the instant case, and that it is immaterial whether the permission springs from the owner's liability statute in Idaho or from a construction of the Western Casualty Company insurance policy, permissive use of the truck being the same whether applied to the owner's liability statute or whether applied to the Western Casualty Company policy.

SECOND: That M. Burke Horsley was not operating the truck of William S. Gagon with his permission as is

required by the Western Casualty Company policy, the evidence, and all of the evidence, in this case being undisputed either in the instant action or in the State Court action, all of the evidence of all of the witnesses being to the effect that William S. Gagon himself did not grant permission to use the truck, but such permission was granted by Jessie Gagon, wife of the named insured.

THIRD: That owner's liability as provided for in Section 49, 1404, Idaho Code, is secondary, and the owner cannot be held liable unless the operator of the truck is made a party and unless collection of the judgment cannot be had against the operator, and, further, the statute provides for subrogation on the part of the owner against the operator in the event the owner is required to pay a judgment under the liability imposed by Section 49-1404. The liability of the owner of the truck beyond the liability imposed by the statute could not be enlarged by the wording of the policy of insurance, and the liability of the insurance carrier can in no case be greater than that of Gagon for whom the insurance was written.

FOURTH: That the coverage of the policy written by Western Casualty and Surety Company did not extend to the truck in the use to which it was being put, namely, in the business of the C. H. Elle Construction Company.

FIFTH: The filing of the Form No. S. R. 21, evidence of financial responsibility, could have no force or effect because by statute any evidence of the filing of the form is

prohibited. Section 49-1511, Idaho Code.

SIXTH: The C. H. Elle Construction Co., a corporation, and M. Burke Horsley were defendants in the State Court and were defended by the same counsel that instituted the instant action and in the State Court the St. Paul- Mercury Indemnity Co., a corporation, appeared and defended on behalf of C. H. Elle Construction Co., a corporation, and M. Burke Horsley and took the position that the truck was not being driven with the permission of Wm. S. Gagon, while in the instant action they take the exact opposite position and allege that it was being driven with permission.

ARGUMENT AND AUTHORITIES

I.

The defendant contends that the trial court properly held that the issue, i.e., whether or not M. Burke Horsley, in the employment of C. H. Elle Construction Co., was using the truck with the permission of the named insured and owner, William S. Gagon, had already been decided in the State Court action, and, having been decided in the State Court action, that decision is final and conclusive. In the case of *Maryland Casualty Company vs. Lopopolo,* 97 F. 2d 554 (9th Circuit) it is held that a judgment against an insured and his son for injuries arising out of an automobile accident based on the theory that the son, who had permission, was operating automobile, was conclusive and that the insurer could not defend insured's action on liability

policy on ground that no judgment had been obtained against insured, on the theory that someone else was operating the automobile who did not have the permission of the owner. The essence of the action above referred to was to again try the question of who was operating the automobile, whether someone with the permission of the named insured or someone who did not have the permission.

In the *Lopopolo* case just cited the following language appears:

> "There was in the Donato case, a conflict of evidence as to whether, at the time of the collision, appellee's automobile was being operated by Jack Lopopolo, as claimed by Donato, or whether, as claimed by appellant, it was being operated by Jack's younger brother, Dan Lopopolo, who, it is conceded, never had appellee's permission to operate the automobile. This conflict was, by the jury's verdict, resolved in Donato's favor."

This court held that a determination of that fact was final and could not be reviewed in the action.

In the instant case the judgment entered in favor of Gagon and against the plaintiffs with respect to permissive use of the automobile by the owner Gagon was conclusive and finally settled in the State Court case. Some cases cited by appellant, and particularly the case of *Dobbins vs. Barns* (9th Circuit), 204 F. 2d, 546, we do not believe is in

point because in that case there was no opportunity to fully litigate the issue in the other action. In the case of *Dobbins vs. Barns* the holding in the case of *Ohio Casualty Company vs. Gordon,* 95 F. 2d, 605, is referred to. In the *Dobbins* case, relied upon by appellants, the following appears:

> "Although sometimes parties arrayed as co-parties on the record may nevertheless be adversaries in fact as to an issue, Ohio Casualty Ins. Co. vs. Gordon, supra, yet such cannot possibly be the case here for the Tax Court would be without jurisdiction to entertain any such issue or controversy as between these two parties."

In the case of *Ohio Casualty Insurance Company vs. Gordon,* supra, it is held:

> "But the formal arrangement of the parties on the record is not important (Chicago, Rock Island & Pacific R. Co. vs. Schendel, 270 U. S. 611, 615, 46 S. Ct. 420, 422, 70 L. Ed. 757, 53 A. L. R. 1265), and if coparties on the record were in fact adversaries as to an issue, and such issue was in fact litigated and they had full opportunity to contest it with each other, either upon the pleadings between themselves and the plaintiff or upon cross-pleadings between themselves, they are concluded by the adjudication of such issue in a subsequent controversy between each other."

In support of this statement many cases are cited in the footnote. The rule recognized in the *Dobbins* case and clearly set forth in the *Ohio Casualty vs. Gordon* case applies in full force and vigor to the instant action.

In the State Court case in which Mary Lou Campbell and her children were plaintiffs and C. H. Elle Construction Co. was defendant and in which the appellant herein, St. Paul Mercury Indemnity Company, through their counsel, were actually in the case by their own admission, ample opportunity was given to them to fully litigate the issue as to whether or not the truck was being operated with the permission of Gagon. In the answer of C. H. Elle Construction Co., their insured, St. Paul Mercury Indemnity Company could have admitted the permissive use of the truck as alleged by the plaintiff and could have called witnesses or could have done any other appropriate thing to bring about a holding that the truck was being used with the permission of Gagon. We say, therefore, that ample opportunity was afforded them in the State Court case to prove permissive use, and if they had admitted the truck was being used with Gagon's consent, that issue could have been tried as between them and the defendant Gagon. This they did not elect to do and are foreclosed from again raising the issue by the holding of the trial court and by the array of authorities cited in the *Ohio Casualty Insurance Company vs. Gordon* case, supra. There is in this case no question about how Horsley came into possession of the Gagon truck. No other facts could have been elicited or proved to shed light on this transaction; all parties to the action in the State Court and in this action

agree that Jessie Gagon furnished the keys to the truck. This Court's attention is, therefore, respectfully called to the authorities cited herein and to the following cases:

Chicago, Rock Island & Pacific R. Co. vs. Schendel, 270 U. S. 611, 615, 46 S. Ct. 420, 422, 70 L. Ed. 757, 53 A. L. R. 1265;

Corcoran vs. Chesapeake & Ohio Canal Company, 94 U. S. 741, 744, 745, 24 L. Ed. 190;

Louis vs. Brown Township, 109 U. S. 162, 168, 3 S. Ct. 92, 27 L. Ed. 892;

Atchison, T. & S. F. R. Co. vs. A. B. C. Fireproof Warehouse Company, 8 Cir., 82 F. 2d 505, 515;

City of El Reno vs. Cleveland-Trinidad Paving Company, 25 Okl. 648, 107 P. 163, 164, 165, 27 L. R. A., N. S. 650;

Baldwin vs. Hanecy, 204 Ill. 281, 68 N. E. 560, 562;

National Marine Bank vs. Heller, 94 Md. 213, 50 A. 521, 523;

Waldo vs. Waldo, 52 Mich. 91, 17 N. W. 709; Id., 52 Mich. 94, 17 N. W. 710;

Freeman on Judgments, 5th Ed., Vol. 1, S. 425.

In the case of *Williams Estate*, 223 P. 2d 248, it is held:

> "Under doctrine of 'collateral estoppel' where subsequent litigation is based upon a different cause of action from that upon which prior suit was based, prior judgment is conclusive between parties in such case as to questions actually litigated and determined by prior judgment but is not conclusive as to questions which might have been but were not litigated in original action."

In the original action in the State Court the defendants were C. H. Elle Construction Co., a corporation, M. Burke Horsley, an admitted employee of the C. H. Elle Construction Co., a corporation, and upon whose negligence the action was based, and Wm. S. Gagon (there was another party defendant but a non-suit was granted as to such defendant by the State Court hence no further reference will be made to such party). The action was defended by the same counsel that brought the instant action, hence it can be readily assumed, and assumed without contradiction, that the St. Paul-Mercury Indemnity Co., a corporation, was actively participating in the action in the State Court as it was up to that company to defend its insured the C. H. Elle Construction Co., a corporation, and its employees, among which was M. Burke Horsley, all of which it did, and in that action in the State Court both Horsley and the C. H. Elle Construction Company took the position that the truck was being driven without permission of Wm. S. Gagon, and Gagon likewise took the same position and the jury found in favor of Ga-

gon on that issue. In the instant action the same parties namely C. H. Elle Construction Co., a corporation, and St. Paul-Mercury Indemnity Co., a corporation, take the position that the truck was being driven with permission. We maintain that no litigant can take inconsistent positions on an issue that was one of the paramount issues in this action and in the State Court action. We desire to call the Court's attention to the particular paragraphs in the various Exhibits, namely:

In the Campbell vs. Elle Construction case, State Court, paragraph 4 (R. 154) reads as follows:

> "That at all times mentioned herein, defendant William S. Gagon, was the owner of a 1954 Chevrolet truck, bearing 1954 Idaho license, 3C-1010; that at such times the defendants, M. Burke Horsley and Max Larsen, were operating such truck with the permission and consent of the owner, William S. Gagon."

and the answer of C. H. Elle Construction Company in the State Court, (R. 167-168) as well as the answer of M. Burke Horsley in the State Court (R. 173), read as follows:

> "Answering Paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a 1954 Chevrolet truck bearing 1954 Idaho License plates 3C-1010, but denies each and every other allegation contained in said paragraph."

The same counsel prepared the answers that prepared the complaint in the instant case a portion of paragraph V (R. 11) of the Amended Complaint reads as follows:

> "That on or about the 22nd day of August, 1954, the above-mentioned vehicle owned by William S. Gagon was being driven, with the consent and permission of William S. Gagon, by one M. Burke Horsley - - - -."

In the case of Loomis vs. Church, 76 Ida. 87, 277 P. 2d 561, the Court had the following to say:

> "Where litigant, by means of sworn statements, obtains a judgment, advantage or consideration from one party, he will not thereafter, by repudiating such allegations and by means of inconsistent and contrary allegations or testimony, be permitted to obtain a recovery or a right against another party, arising out of the same transaction or subject-matter."

In *5A Am. Jur.* Page 192, Sec. 192, the following appears:

> "The cases generally support the proposition that a judgment in an action by a third person against one insured under an automobile liability policy may be invoked as conclusive in its favor by the insurer in a subsequent action against it, if the issue decided in such prior action was material to the decision

> thereof and is identical with the issue claimed in the later action to have been adjudicated even though the insurer was not a nominal party to the first suit."

The above cases are clear authority for the proposition that the issue of permissive use, having been heretofore fairly presented and decided, is not subject to readjudication in the instant action; particularly is this true in the instant case where the appellants herein had ample opportunity to competently try the issue.

II.

The Western Casualty policy of insurance provides that the insurance is in effect provided the actual use of the automobile is by the named insured or with his permission. It is clear from the record in this case that M. Burke Horsley did not have permission of the named insured, William S. Gagon. He did, however, have the permission of Jessie Gagon who worked part time in the Gagon Lumber Yard. The appellee herein contends that permission of the wife in such case is not permission of the named insured. In the case of *Ohio Casualty Insurance Company vs. Goodman*, 22 P. 2d. 997, the Supreme Court of Oklahoma held:

> "It is to be observed that said extended coverage clause does not include the owner of the car. Had the parties to the contract desired that this extended coverage, which permitted the car to be operated by the express or implied consent of the assured named in the

> policy and the owner of the car, it would have been easy to have incorporated such provision in said policy. This coverage clause did not apply to the owner of the car."

Ownership of the car under the authorities is not the vital issue. The fact that Jessie Gagon was employed part time as a bookkeeper in the Gagon Lumber Yard would not be sufficient so that she could grant the necessary permission. Appellants in their brief cite many authorities and argue vehemently that this authority to use the automobile may be express or implied. We submit that there is no express or implied authority for Jessie Gagon to authorize the use of the truck by Horsley in the business of C. H. Elle. Jessie Gagon testified that to her knowledge Mr. Horsley had never borrowed the equipment of the Gagon Lumber Yard before. (R. 111). Mrs. Jessie Gagon also testified that she had never been authorized by her husband to loan the truck or any of the Gagon Lumber Yard equipment. (R. 114), and that none of the equipment had ever been loaned to M. Burke Horsley before. (R. 115). William S. Gagon in deposition testified that he had never loaned any equipment of the Gagon Lumber Yard to M. Burke Horsley, an employee of C. H. Elle Construction Co. (R. 121). He further testified that he had never rented the truck to M. Burke Horsley. (R. 125). William S. Gagon likewise testified on deposition that he had never authorized Mrs. Jessie Gagon to loan the truck in question. (R. 126), or to loan any equipment of the company. (R. 126). The fact that M. Burke Horsley, employee of C. H. Elle Construction Co. had never at any time before

borrowed any equipment from William S. Gagon or the Gagon Lumber Yard certainly does not establish any implied authority to loan the truck, nor does it establish any practice of loaning which might give rise to an implied permission. Likewise the record is clear that Jessie Gagon did not have permission or authority as an agent, or wife, to loan the truck in question and had never on any occasion previously loaned the truck, nor had Horsley, the employee of Elle, on any previous occasion borrowed the truck. Under the terms and provisions of the policy, permissive use of the truck could be granted only by the named insured. By the very terms and conditions of the policy itself, Jessie Gagon was not a named insured (R. 50-57), and the fact that she might be part owner, as wife, of community property, would not cause her to be a named insured. She, therefore, was without authority to grant permission to use the truck within the meaning of the policy of insurance or within the meaning of the owner's liability law in Idaho, and did not, either by direct authority or by implication, have the power as an agent to loan the truck in question.

Jessie Gagon, the wife of the named insured, did not have authority to grant permission to Horsley to borrow the truck. She did not have authority to do so by virtue of the marital status because the wife is not necessarily the agent of the husband for such purposes, and under the Idaho law of community property the husband is the manager and has control of all the community property. Marital status, therefore, would surely not be sufficient to create the authority in her to grant permission to use the truck. The fact that

Jessie Gagon was a part-time employee and bookkeeper at the business of the Gagons could not possibly be sufficient to authorize her to loan the truck. A person serving in the capacity of a part-time bookkeeper such as she did would have no authority to loan equipment of the company, and this is fortified by the fact that neither Horsley nor Elle Construction Co., nor anyone else, had ever borrowed any equipment upon the authority of Jessie Gagon, or, for that matter, upon the permission of William S. Gagon, the named insured. It follows, therefore, that the truck was not being operated by Horsley, agent of C. H. Elle Construction Co., with the permission of the named insured.

III.

Any liability of William S. Gagon for whom the appellee, Western Casualty and Surety Company, had written his policy of insurance, would have to be predicated upon Section 49-1404, Idaho Code. Said section in part provides:

> "1. Responsibility of owner for negligent operation by person using vehicle with permission—Imputation of negligence. Every owner of a motor vehicle is liable and responsible for the death of or injury to a person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all

purposes of civil damages."

Subsection 3 of the same section provides:

> "3. Operator to be made party defendant—Recourse to operator's property. In any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be had upon said operator within this state. Upon recovery of judgment, recourse shall first be had against the property of said operator so served."

Subsection 4 of said section provides:

> "4. Subrogation of owner to rights of person injured—Recovery from operator—Bailee and driver deemed operators. In the event a recovery is had under the provisions of this section against an owner on account of imputed negligence such owner is subrogated to all the rights of the person injured and may recover from such operator the total amount of any judgment and costs recovered against such owner. * * *."

Appellant contends very frankly that the liability of the Western Casualty and Surety Company, appellee herein, is primary and that the liability of the appellant, St. Paul Mercury and Indemnity Company, is secondary. The lia-

bility of the Western Casualty and Surety Company under their policy of insurance issued to William S. Gagon could not be any greater than the liability of William S. Gagon; the whole basis of liability of Gagon under the circumstances of this case being fixed by statute, it is clear from the statute that his liability is secondary. How then can it be successfully argued that the liability of his insurance carrier is primary? Before an action under the statute could be successfully maintained against William S. Gagon, an action would also have to be brought (if service could be made) against M. Burke Horsley, the operator of the Gagon truck, and Gagon would have no liability under the statute, nor would the Western Casualty Company, his insurer, until after recourse first had to operator's property.

It was clearly the intent of the Legislature that the owner of a car would have no liability under the owner's tort liability statute unless the operator was made a party and service of process could be had upon him, nor would the owner of the car be required to pay any judgment until after recourse could be had against the owner of the property. It is, therefore, clearly the intention of the Legislature that the liability of the owner is not primary, but secondary. In the case of Campbell, et al, vs. C. H. Elle Construction Company, M. Burke Horsley and William S. Gagon, the liability of C. H. Elle Construction Company and the liability of his insurer, appellants herein, St. Paul Mercury and Indemnity Company, is derived from the negligence of M. Burke Horsley, an agent, servant and employee of C. H. Elle Construction Co., and the liability of the master and servant

under such circumstances is equal.

In the case of Anneker vs. Quinn-Robbins Co., an Idaho Corporation, and Independent School District of Boise City, defendants, the Supreme Court of Idaho had the following to say:

> "The occurrence involved in this case did not grow out of the operation of respondent School District's transportation system; hence the liability coverage afforded by the policy cannot be extended to such occurrence. The parties did not intend that the policy encompass any liability coverage except as authorized by the legislative enactment . . ."

This case is found in the advance sheets of 323 P. 2d, P. 1078, No. 5 dated May 16, 1958.

In the case of Ford vs. City of Caldwell, 79 Ida, , 321 Pac. 2d 589. No. 2 advance sheets dated March 14, 1958, the Supreme Court of the State of Idaho, had the following to say:

> "Law in force at time of making of insurance contract becomes a part of contract and is read into it, but such rule does not extend to statute enacted after making of contract."

It, therefore, follows that the liability of the appellees herein is secondary to the liability of both the operator of

the truck and the person responsible for his negligent conduct, to-wit, C. H. Elle Construction Co., and, in turn, his insurance carrier, St. Paul Mercury and Indemnity Company, appellant herein. The liability of the appellee cannot be greater by reason of the existence of the policy than the liability imposed by statute.

IV.

The policy written in this case and an exhibit (R. 50-56) provides that the purposes for which the automobile described in the policy, i.e., the Gagon truck, was to be used are commercial—Class 5CA. 5CA of the policy states:

> "The term 'commercial' is defined as use principally in the business occupation of the named insured as stated in Item 1 (Item 1 says: Lumber Business, Builder, etc.) including occasional use for personal pleasure, family and other business purposes." (R. 52).

It is stipulated and admitted that the truck at the time of the accident was being used in the business of Elle Construction Co., and not in the business of William S. Gagon, —Lumber Business, Builder, etc. It was not contemplated by the policy of insurance that the insurance would inure to the benefit of the business being conducted under the name and style of C. H. Elle Construction Co., Inc.

V.

Appellants contend that the Western Casualty and Surety Company, appellee, acknowledged their liability by their having filed form No. S. R. 21, evidence of financial responsibility provided for by the Idaho law upon the happening of an accident under circumstances like the one in question.

> "49-1511. Matters not to be evidenced in civil suits. —Neither the report required by section 49-1504, the action taken by the commissioner pursuant to this act, the findings, if any, of the commissioner upon which such action is based, nor the security filed as provided in this act shall be referred to in any way, nor be any evidence of the negligence or due care of either party, at the trial of any action at law to recover damages."

Appellee takes the position that S. R. 21 is incompetent evidence for any purpose simply by the very terms of the statute requiring the filing of such a document. The statute, we think, is very clear and prohibits the consideration of such filing as evidence of any kind. The statute prohibits reference to the filing of the S. R. 21 in any case.

It would be a very strange situation if an insurance agent by filing form No. S. R. 21 could bind the company and thus admit insurance coverage in a case where no coverage in fact existed. The filing of the S. R. 21 certainly

would not be conclusive evidence that the company filing the form had extended coverage to the particular situation. Whether or not a particular insurance policy affords coverage under particular facts and circumstances has long been a vexing problem to lawyers and to judges, and for appellant to contend that the determination of this issue by an insurance agent was final and conclusive, to us seems completely untenable. We think a different situation would apply were the contest between the insured and his own company. In such case it is conceivable that a company would be estopped to deny coverage where they had filed S. R. 21 on behalf of their insured, but such is not the case here. The Western Casualty and Surety Company appeared in the trial of the case in State Court and defended its insured, William S. Gagon, and this contest is not between William S. Gagon and named insured and themselves, but is between Western Casualty and Surety and the appellant herein, which presents an entirely different situation.

We respectfully submit, therefore, that the judgment of the trial court should be affirmed.

Respectfully submitted,

O. R. BAUM
RUBY Y. BROWN
Residence: Pocatello, Idaho

BEN PETERSON
Residence: Boise, Idaho
ATTORNEYS FOR APPELLEE

Receipt of service of three copies of the above brief is hereby acknowledged this 18 day of July, 1958.

A. L. MERRILL
R. D. MERRILL
W. F. MERRILL
Attorneys for Appellants
Residence: Pocatello, Idaho

APPENDIX

EXHIBITS

EXHIBITS	Record Page
Plaintiff's Exhibit A—ledger sheet	R 112
Defendant's Exhibit 1—charge slip	R 116
S. R. 21	R 58-59
Exhibits attached to Stipulation dated January 7, 1957, all of such exhibits being papers filed in the State Court in the case of Mary Lou Campbell, and Terrill Ray Campbell and Curtis Howard Campbell, minors, by their Guardian Ad Litem, Mary Lou Campbell, Plaintiffs, vs. C. H. Elle Construction Co., a corporation, M. Burke Horsley, Max Larsen, and W. S. Gagon, defendants, except exhibit "h".	
Exhibit A, Second Amended Complaint of Plaintiffs in State Court	R 153-159
Exhibit B, Answer of Defendant W. S. Gagon in State Court	R 159-166
Exhibit C, Answer of defendant C. H. Elle Construction Company in State Court	R 166-171

Exhibit C-1, Answer of defendant M. Burke Horsley in State Court .... R 172-176

Exhibit D, Verdict in State Court .... R 177

Exhibit E, Judgment on Verdict in State Court .... R 177-178

Exhibit F, Order granting judgment in favor of W. S. Gagon in State Court ... R40-41 and R179

Exhibit G, Satisfaction of Judgment in State Action .... R 179-180

Exhibit H, The two insurance policies. While these policies are attached to the stipulation they are only summarized in the transcript at R. 150. The entire policy of Gagon's was set up in the Transcript (R51-55), but such is not the case as to the policy of the St. Paul-Mercury Indemnity, the latter policy being merely referred to .... R 150

No. 15932

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. H. ELLE CONSTRUCTION CO., a corporation and ST. PAUL-MERCURY INDEMNITY CO., a corporation,

Appellants.

vs.

WESTERN CASUALTY AND SURETY COMPANY, a corporation,

Appellee.

Reply Brief of Appellants

Appeal from the United States District Court for the District of Idaho, Eastern Division

A. L. MERRILL
R. D. MERRILL
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Residence: Pocatello, Idaho
Attorneys for Appellants

FILED
AUG - 8 1958
PAUL P. O'BRIEN, CLER

GATEWAY PRINTERS—POCATELLO

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Appellants.

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a corporation,

Appellee.

Reply Brief of Appellants

STATEMENT OF FACTS

Because we believe that the appellee has, in its Statement of Fact, enlarged upon and exceeded the facts found in the record in one main part, we present herewith a short Reply to the appellee's Statement of Facts. We must take issue with appellee's Statement of Fact found on Page 4 of its Brief, wherein it is stated that the Amended Complaint of the plaintiffs in the State Court action alleged that the truck operated by Horsley was being operated by him with the

permission and consent of William S. Gagon and that such allegation was denied by C. H. Elle Construction Company in that suit. The record is clear on this point. At R. 153, the Second Amended Complaint of the plaintiff in the State Court action is set out. Paragraph IV thereof is as follows:

> "That at all times mentioned herein, defendant, William S. Gagon, was the owner of a 1954 Chevrolet Truck bearing a 1954 Idaho license 3C 1010; that at such times, *the defendants, M. Burke Horsley and Max Larsen, were operating such truck with permission and consent of the owner,* William S. Gagon."

C. H. Elle Construction Company answered that allegation as follows:

> "Answering Paragraph IV of said Second Amended Complaint, this answering defendant admits that William S. Gagon was the owner of a 1954 Chevrolet Truck bearing 1954 Idaho license plates 3C 1010, but denies each and every other allegation contained in said paragraph." (R. 167-168).

Denial was that both Horsley and Hansen were using the truck with permission.

Another fact that should perhaps be pointed out is that the present suit in the Federal Court was commenced September 19, 1955 (R. 7), slightly less than a full month

before any Answer was filed in the then pending State Court proceedings. (R. 171).

ARGUMENT

The first two points considered by appellee in its Brief deal with the question of whether or not the trial court was correct in holding that the State Court Judgment relative to use of the vehicle was conclusive in this action. It is the appellant's position that the parties were not the same, the issues were not the same, and the parties herein were not adversary parties in the State Court. The question of permissive use under the wording of the insurance contract issued by Western Casualty and Surety Company is a different issue than the one presented in the State Court, which was permissive use under Section 49-1404, Idaho Code. C. H. Elle Construction Company was a co-defendant with Gagon, insured by Western Casualty & Surety Company, in the State Court. It was not possible for the question of policy coverage to be litigated in that court action. Stearns vs. Graves, 61 Idaho 232, 199 P. 2d 955. One of two defendants who are involved in an automobile accident and sued thereon, may not, in a cross complaint, litigate any question between the two defendants. Liebhauser vs. Milwaukee Elec. R. & Co., 193 N. W. 522 (Wisc.). No counterclaim could have been brought (Idaho Code Section 5-613) no cross-complaint could have been brought (Idaho Code Section 5-617; Liebhauser vs. Milwaukee Elec. R. & Co., 193 NW 522 (Wisc.)), and no third party interpleader is allowed. The action was tried on the pleadings of Mary Lou Campbell over which the appellants herein had no control. There was

no adversary pleadings and there could not have been; the liabilities as between C. H. Elle Construction Company and the insuror of Gagon were not presented; the evidence available with Western Casualty & Surety Company as a defendant, to-wit: Admissions against interest and actions between Gagon, Horsley and the representatives of Western Casualty & Surety Company, were incompetent and inadmissable in the State Court proceedings. C. H. Elle Construction Company had no standing to perfect an appeal to the supreme court of the State of Idaho relative to the ruling on permissive use as between Campbell and Gagon.

That the pleas of res judicata or collateral estoppel are not available for the appellee in this action is clearly shown in the recent case of Hinchey vs. Sellers, (N. Y.) 172 N. Y. S. 2d 47 (1958). In that case, one Orville Sellers owned an automobile which was insured by the National Surety Company and the insurance policy contained the standard "omnibus clause." Orville Sellers granted permission to his son, Donald, to use the vehicle and Donald in turn granted a limited permission to a third party, O'Rourke. O'Rourke, while allegedly exceeding his permission, was involved in an accident. An action was brought by the administrator of the estate of a person killed in the accident against O'Rourke. The insurance company declined to defend the action and a declaratory judgment suit resulted wherein it was held that there was no permission under the terms of the policy and hence, the insurance company was not obligated to conduct a defense. Thereupon the present action against O'Rourke and Donald Sellers was commenced in New York

alleging that the automobile was being used by O'Rourke with "the permission, express or implied," of the defendants under the New York permissive use statute.

Syllabus No. 1 is as follows:

> "Where issue in New Hampshire action against driver of automobile and liability insurer was whether use of automobile at time of accident was within permission of insured within omnibus coverage clause of liability policy and issue in instant action against owners of automobile was whether at time of accident automobile was being operated with permission of owner within New York statute making owner liable for negligent acts of third person driving automobile with owner's permission, such issues were not the same, and consequently determination in New Hampshire action was not res judicata in instant action."

Syllabus 4:

> "The doctrine of collateral estoppel is not applicable to evidentiary findings made in a prior action involving a different ultimate issue."

Syllabus 5:

> "Prior New Hampshire declaratory judgment that automobile liability insurer was not required to defend action against third person driving automobile

> when passengers were killed in that automobile was not being used with permission of insured within omnibus coverage clause of policy did not estop plaintiffs suing owners for deaths of some passengers from relitigating the underlying evidentiary questions bearing upon the ultimate issue of whether the automobile was being used at time of accident with permission of owner within New York statute making owner liable for negligent acts of third person driving automobile with permission of owner."

And on page 50:

> "Two questions are presented upon this appeal: (1) whether the issue of permission of the insured under the policy which was decided in the New Hampshire action, is the same as the issue of permission of the owner under the New York statute, so that the determination of that issue in the New Hampshire action is binding in the present action. (2) Even if the ultimate issue is not the same, whether the evidentiary findings by the New Hampshire court are binding in the present action, so that, upon the basis of those findings, it may be summarily determined that the automobile was not being used with the permission of the owner at the time of the accident, within the meaning of the New York statute."

> "There can be little doubt but that the answer to the first question must be in the negative.

"* * * It is clear in this case that the issue in the New Hampshire action was not the same as that in the present action. Even though the word 'permission' appears both in the insurance policy and in the statute, the word did not necessarily have the same legal meaning in the two contexts. The question of the meaning of the word in the policy was to be determined as a matter of contract law in accordance with the intention of the parties to the contract under the law governing the contract. The meaning of the word 'permission' in the New York statute must be determined in accordance with the intent of the Legislature, taking into account the policy objectives which the Legislature sought to carry out."

In answering the second question, the Court, on page 53, states:

"However, we believe that the doctrine of collateral estoppel is not applicable to evidentiary findings made in a prior action involving a different ultimate issue. In our opinion, the public policy back of the doctrine of res judicata and collateral estoppel is given sufficient effect if relitigation of the same ultimate issue is barred. To bar the relitigation of underlying evidentiary questions, simply because findings were made upon them in a prior action involving a different legal issue, would go too far. If the issue of ultimate fact is not the same in the two actions, frag-

> mentary findings of evidentiary fact in the first action ought not to be pulled out of the adjudication and made independently binding. Collateral estoppel should properly be restricted to ultimate facts."

See also: Mazzilli vs. Accident and Casualty Insurance Co. (N. J.) 139 A. 2d 741 (1958).

It should be kept in mind that in the above quoted case of Hinchey vs. Sellers, the same plaintiff brought both actions and had control of the evidence to be adduced for the party having the burden of proof.

Appellee cites several cases to support its position. In the Lopopolo case, Page 8 of Appelle's Brief, the facts involved show that one Donato sued the owner of a vehicle, John Lopopolo, and the son of the owner, Jack Lopopolo, for damages arising from an automobile collision, alleging that the son was operating the vehicle with the permission of John Lopopolo and that the accident was due to the negligence of the son. Maryland Casualty Company, the appellant, in that case, carried the insurance coverage for John Lopopolo and defended the suit on behalf of both defendants. There was a direct conflict in the evidence based upon the pleadings as to whether Jack Lopopolo was operating the vehicle and the jury held that he was. Thereafter, John Lopopolo brought suit against the Maryland Casualty Company to recover the amount of the judgment in the prior suit. The Court held that the judgment obtained in the state

court was on the basis that Jack Lopopolo was operating the vehicle which was the exact question involved in the second suit and was therefore final. This case, we submit, is not controlling herein because (1) the question of fact—that is, who was the operator—was fully presented and tried out pursuant to the pleadings, while in the present case question of permission under the terms of the insurance contract was never presented nor could it have been presented; (2) the exact question of who was driving was decided in an adversary proceeding, with the appellant in the later federal court case being one of the adversaries, while in the case at bar, the present point was never litigated as between adversary parties and the present appellants had no opportunity to litigate it; (3) The question of fact,—that is, who was the operator,—was decided on all of the evidence and the evidence was presented by the insurance company as it controlled the defense, while in the present action the evidence of the question of permission was presented by and adduced by plaintiff in the state court case and not the C. H. Elle Construction Company. In addition, evidence of the contractual relationship rising between the appellants and appellee herein could not have been presented in the state Court.

Appellee cite the case of Williams Estate, 223 P. 2d 248, Page 13 of Appellee's Brief, as apparent authority for its proposition that collateral estoppel can be asserted in this action. In the Williams Estate case, a prior default divorce had not presented the question of community property of the present petitioner and her deceased ex-husband, therefore the petitioner, being the surviving ex-wife, was held not

to be foreclosed from presenting the question during the probate proceedings of the deceased ex-husband's estate. We submit that this is authority for the proposition that collateral estoppel is not available respecting a question which might have been but was not litigated in an original action. Even further than this, however, the question presented in this appeal is the question of the interpretation of the contract of insurance which was never in issue in the state court. There is, therefore, no room for the theory of collateral estoppel.

It is submitted that the Loomis case cited by appellee on Page 15 of its Brief is based upon a rule foreign to the facts involved in this appeal and is, therefore, not in point.

It is submitted that the basic theories developed in the case of Hinchey vs. Sellers, cited above, are controlling herein, to-wit: That the question of permission within the omnibus clause of the liability insurance policy is foreign to and different from the question of permission within the meaning of the permissive use statute, that the doctrine of collateral estoppel is not applicable where there is involved a different ultimate issue.

The questions presented on Pages 16-19 of Appellee's Brief deal with the question of permission under the terms of the policy. Appellee cites no cases except the Goodman case, which, we submit, can be of no comfort to the Appellee as it is based upon a different type of policy which expressly stated that the omnibus feature was not applicable

to the person involved. This is not the situation herein. Appellants refer to the cases and the discussion in their original Brief relative to permission. None of the cases cited therein have been distinguished, controverted or opposed by the appellee in its Brief.

On Pages 19-23 of its Brief, the Appellee presents a discussion of a proposition that any liability of Gagon would have to be predicated upon the permissive use statute of the State of Idaho, Idaho Code 49-1404. This discussion completely misses the purpose of the omnibus clause and is beside the point. Appellants herein are not suing Gagon and are not attempting to fix liability upon Gagon by virtue of a state statute of permissive use of an automobile. On the contrary, appellants are suing the Western Casualty & Surety Company on the contract of insurance issued by it, which, we submit, makes the appellant herein insureds under the policy. This is a suit in contract against what is in effect appellants own insurance company and is not a suit in tort against the owner of an automobile. This is clearly brought out in the case of Hinchey vs. Sellers cited above, Pleasant Valley Lima Beans & Warehouse Ass'n vs. Cal-Farm Insurance Company (Cal.), 298 P. 2d 109, cited in Appellants original Brief, and Leach vs. Farmers Automobile Inter-Insurance Exchange, 70 Idaho 156; 213 P. 2d 920. The argument advanced by appellee under this heading shows a complete misconception of the fundamental issues involved in this suit. Idaho Code, Section 49-1404 is completely inapplicable. Furthermore, the Anneker Case cited on Page 22 of Appellee's Brief is, according to our understanding of

that case, completely foreign both to the issues in this case and to the issue presented by appellee. In that case, a school district in the State of Idaho along with the adjoining landowner was sued for damages for the death of a child by drowning. The Court held that the school district is immune to tort action. Appellants therein asserted a further ground against the school district upon the theory that a liability insurance policy written in favor of the district waived the governmental immunity. The court pointed out that such policy was an automobile liability policy taken out by the school district pursuant to a state statute requiring insurance with respect to the operation of a transportation system, under Idaho Code 33-801. This statute also contained a provision that the insurance company should not be entitled to the defense of governmental immunity of the insured. It is submitted that this case is beside the point.

The question of whether or not the actual use of the vehicle comes within the terms of the policy is apparently presented on Page 23 of Appellee's Brief. The policy states, under Item 5, as follows:

> "Use: The purpose for which the automobile is to be used are 'Commercial Class 5 CA' * * * The term 'commercial' is defined as used principally in the business occupation of the named insured as stated in Item I, *including occasional use for personal pleasure, family, or other business purposes.*" (R. 51).

The policy, then, on its face, contemplates that the ordinary

use for the 1954 Chevrolet Truck involved in this action shall be in the business occupation of William S. Gagon but the policy expressly provides that coverage is granted if the vehicle is used occasionally for personal purposes, pleasure, family, or other business purposes of the insured. It is submitted that this clearly includes the use for which the truck was being operated on the day of the accident in this litigation.

The question raised is completely answered, we submit, by the testimony of Mr. William S. Gagon. (R. 128):

> "Q. Was any amount subsequently paid to you for the damage to the truck?
>
> "A. Yes.
>
> "Q. By the Western Casualty and Surety Company?
>
> "A. Yes, sir."

The Western Casualty and Surety Company paid the collision portion of this very policy. When dealing with Mr. Gagon, no question was raised by the insurance company as to improper use which, if a defense in a case at bar, would have also been a defense to the payment of the collision claim to Mr. Gagon. Instead, the Western Casualty and Surety Company admitted their liability, admitted that the use was within the policy provision and paid the collision portion of their obligation.

In the case of Terrasi vs. Peirce, 23 N. E. 2d 871, (Mass.), in speaking of the problem of commercial use under a policy, the Court, on Page 873 states as follows:

> "In the present case, the policy declared merely that the purposes for which the truck is 'to be used are: Commercial.' The intended use was in truth commercial. The regular, habitual and dominant use was also commercial. Any other use was sporadic and occasional. So far as is shown, the use made at the time of the injury would not increase the risk or change the premium classification. To interpret the words used as implying either a warranty or a condition that the truck would never be used for any other purpose, would have for an insured person unfortunate consequences not required, so far as we can see, by any consideration of the situation of the insurer."

The case of Birnbaum vs. Jamestown Mutual Ins. Co., 83 N. E. 2d 128 (N. Y.) presents the situation very similar to the facts at bar. In this case, the occupation of the named insured was designated as "Delivery of Coal—Hudson Fuel Co." The truck involved was coded as "B" and Item 5 of the policy stated that "B" indicated "Commercial" use and defined commercial use as follows:

> (b) "The term 'Commercial' is defined as use principally in the business occupation of the named insured as stated in Item I, including occasional use for

personal pleasure, family and other business purposes.' * * *"

The actual use of the vehicle in the collision in the Birnbaum case was transporting some lumber for a friend and the Court, on Page 130 states:

"However, plaintiff contends and has submitted affidavits alleging facts which, if proved, establish that the truck was principally used to transport coal for the Hudson Fuel Company and that the use at the time of the accident was merely 'occasional use.' In his own affidavitt De Lillo stated:

"On the date of the accident, deponent was requested by a friend, one Harry Watson, to transport some lumber from Yonkers, New York to the Botanical Gardens, Prospect Park, Brooklyn, New York. In compliance with this request, deponent instructed his driver and employee, Archie Spence, to make the delivery of said lumber. * * *"

"* * * This was the first occasion on which this truck was used for any purpose such as above described. On the day previously, it had been used to haul coal for the Hudson Fuel Co. and for about a year and a half before the accident, it was exclusively used daily for the purpose of hauling coal for the Hudson Fuel Co. However, on the day of the occurrence, there was no coal to be hauled by this truck. * * *"

> "In his brief plaintiff admits, as alleged in one of the defendant's affidavits, that Watson paid De Lillo '$3.00 an hour for 7 hours or a total of $21' on this occasion. If it be proved, therefore, that the use by Watson was an 'occasional use' made by DeLillo, the fact of payment indicated that hauling for Watson was an occasional 'business' purpose within the terms of the policy or a court of jury might so find."

Gagon submitted a bill for the use of the truck, and it was paid by C. H. Elle Construction Co. (R. 113-114; 122.)

Appellee attempts, on pages 24-25, to avoid the effect of the S. R. 21 which the duly authorized agent of the appellee signed under oath. In discussing the effect of the filing of the S. R. 21, appellee, on Page 25 of its Brief, states:

> "We think a different situation would apply were the contest between the insured and his own company. In such case, it is conceivable that a company would be estopped to deny coverage where they had filed S. R. 21 on behalf of their insured * * *"

This is exactly the situation here. The company did file the S. R. 21 on behalf of its insured. By virtue of the omnibus clause, Horsley, and through him, C. H. Elle Construction Company, as being legally responsible for the acts of Horsley, became an insured of the Western Casualty and Surety Com-

pany. As pointed out in 5A American Jurisprudence 89, Section 91, automobile insurance::

> "Such a person other than the named insured, while using the motor vehicle for the purposes for which it is insured, and within the scope of the permission granted, becomes an 'additional insured' by virtue of the "omnibus clause" the same as if he were named as an insured in the policy. Upon the happening of an accident while the insured vehicle is being operated by a qualified additional insured, with the permission of the owner, the insurance as to him becomes an independent liability—that is, independent of the insurors responsibility to the named insured."

The case of Leach vs. Farmers Automobile Inter-Insurance Exchange, 70 Idaho 156; 213 P. 2d 920, cited in Appellants original brief, adopts the same theory.

Idaho Code Section 49-1511, relied upon the appellee on Page 24 of its Brief, does not prohibit the consideration of the S. R. 21. By its very words, the Section provides only that the S. R. 21 shall not "be referred to in any way nor be any evidence of the negligence or due care of either party at the trial of any action at law to recover damages." In other words, the S. R. 21 is not evidence of negligence or due care in a tort action for damages between the parties involved in a collision. This section, we submit, by its clear wording and purpose, contains no prohibitions respecting

the use of S. R. 21 as an admission against interest in a suit against the insurance company by an insured.

An interesting sidelight is that this section did prohibit the use of the S. R. 21 in the state court action in Campbell et al vs. Elle et al. In other words, evidence of permissive use under the wording of the insurance contract, was and had to be different than the evidence under the tort action. It is submitted that the case of Behringer vs. State Farm Mutual Automobile Insurance Company, 82 N. W. 2d 915, relied upon by the appellants in their original Brief, is well reasoned, and presents the law applicable in the instant case.

CONCLUSION

The policy issued by Western Casualty and Surety Company to William S. Gagon, designated as an insured thereunder any person using the vehicle or any person or any organization legally responsible for the use providing the actual use of the vehicle was with the permission of the named insured. It is submitted that this policy constitutes C. H. Elle Construction Company as an also insured and the appellants herein were entitled to all of the protection and the contractual obligations set forth in said policy. It is unquestioned that M. Burke Horsley, employee of one of the appellants herein, operated the vehicle covered by Western Casualty and Surety Company when he was involved in a collision, the end result of which was a judgment against appellants herein in the amount of $15,000.00, plus

costs. It is submitted that under the facts submitted in this record, M. Burke Horsley had permission under the interpretation of the insurance policy to use the vehicle, that there was an absolute and undenied acquiescence by the named insured, that the actual use of the vehicle came within the terms of the policy. It is submitted that the appellant, C. H. Elle Construction Company was, in all respects, an insured under said policy.

It is the position of the appellants that Judgment should be rendered for and on behalf of the appellants for the total sum of $13,630.93, plus interest, plus costs of action.

Respectfully submitted:

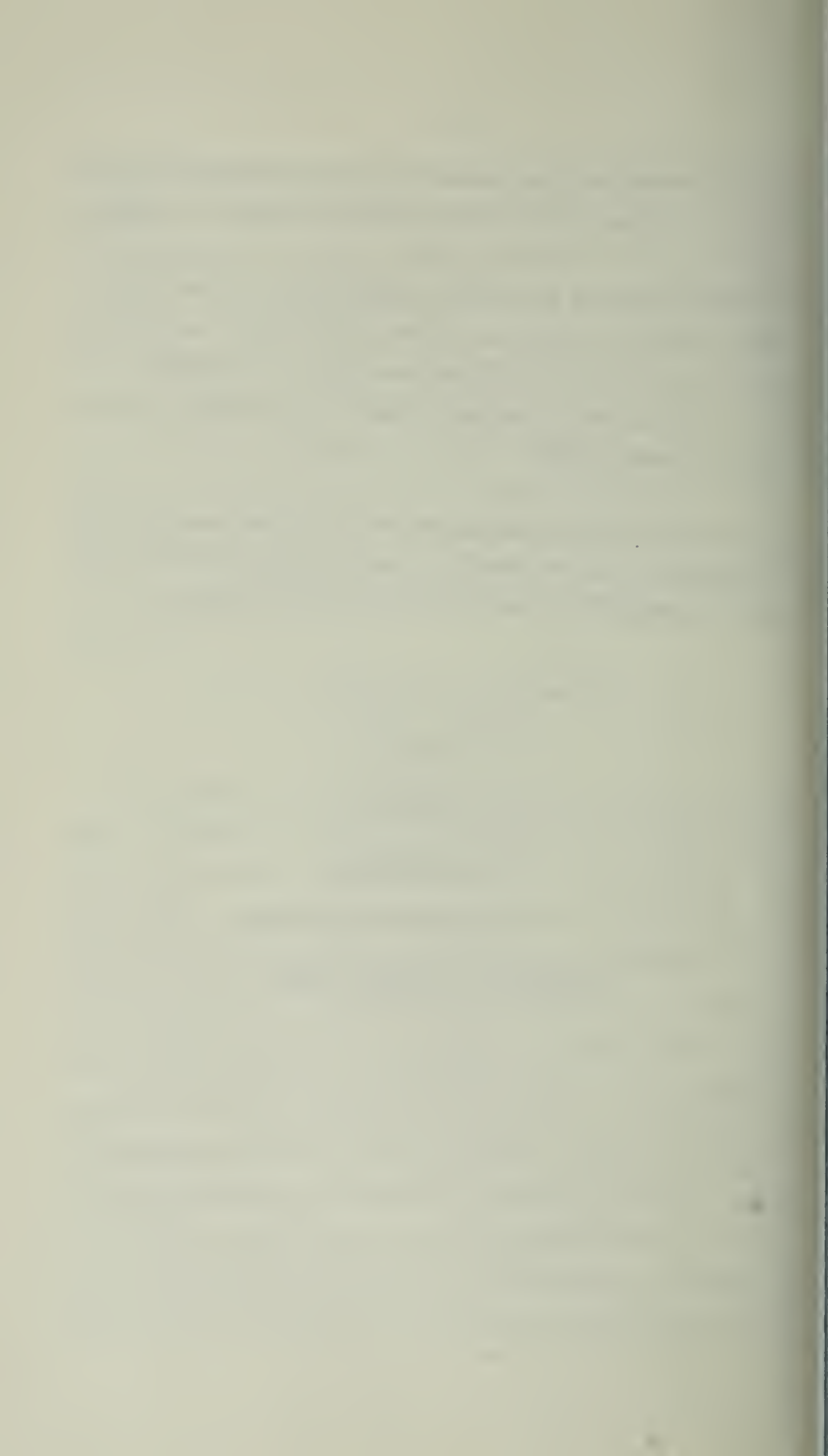
A. L. MERRILL

R. D. MERRILL

W. F. MERRILL

Attorneys for Appellants

Residence: Pocatello, Idaho



No. 15934

United States Court of Appeals

for the Ninth Circuit

EDWARD DUNBAR O'BRIEN, Appellant,

vs.

FRANK SINATRA, et al., Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

FILED
MAY 14 1958
PAUL P. O'BRIEN, CLE

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—5-9-58

No. 15934

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

EDWARD DUNBAR O'BRIEN,
7020 Jeffery Boulevard,
Chicago 49, Illinois.

For Appellees:

PAYSON WOLFF,
6400 Sunset Boulevard,
Los Angeles 28, California.

In the District Court of the United States, Southern District of California, Central Division

No. 1161-57 PH

EDWARD DUNBAR O'BRIEN, Plaintiff,

vs.

FRANK SINATRA, H. SANICOLA, GEORGE WOOD, IRVING LAZAR, MOE ATTENBERG—WILLIAM MORRIS AGENCY, 151 El Camino Drive, Beverly Hills, Calif.

SAMUEL GOLDWYN, R. MONTA, LOUIS B. MAYER, DORE SCHARY, GEORGE MURPHY, SOL SIEGEL, SAMMY KAHN, NICHOLAS BRODZSKY, BING CROSBY, CELESTE HOLM, SIDNEY BLACKMER, MARGALO GILMORE, JUNE ALLISON, ANN SHERIDAN, ANN MILLER, CHARLOTTE GREENWOOD, JEFF RICHARDS, FRED ASTAIRE, JANE POWELL, HELEN ROSE, GEORGE WELLES, GREGORY PECK, LAUREN BACALL, DOLORES GRAY—METRO-GOLDWYN-MAYER STUDIOS, 10202 Washington Boulevard, Culver City, California.

JACK WEBB, REGINALD ROSE—WARNER BROTHERS STUDIOS, 400 West Olive, Brb., Los Angeles, California.

MILTON H. RUDIN, 6400 Sunset Boulevard, Hollywood, California. CAPITOL RECORDS, 1750 North Vine Street, Hollywood, California. GORDON JENKINS, NBC-TV, Sunset & Vine, Hollywood, California. BRODERICK CRAWFORD, 183 Tigertail Road, Los Angeles 49, California. GEORGE SEATON, 5451 Marathon, Hollywood 38, California. LOUELLA PARSONS, International News Service, Hollywood, California. HEDDA HOPPER, Chicago Tribune Press Service, Hollywood, California, Defendants.

COMPLAINT

I. The Court has original jurisdiction, Section 1338 (a) 28, Judicial Code.

II. Prior to February 12, 1955, plaintiff, then and ever since a citizen of the United States, created and wrote original books and music containing large amounts of material wholly original with plaintiff, copyrightable subject matter under the laws of the United States/Universal Copyright Convention; between February 14, 1922 and the present plaintiff complied in all respects with the Act of March 4, 1909, and all other laws governing copyright, securing the exclusive rights and privileges in/to copyright in said books/music and received from the Register of Copyrights certificates of registration dated and identified as follows:

> "The Library of a Lifetime" of Edward Dunbar O'Brien, A283713, 12/31/56; "The Gettysburg Hymn" Eu373849, 5/1/44; 1st Edition, 2nd, E96858, 1/12/55; 3rd Edition, E104688 8/18/56; 4th Edition, A-283713, 12/31/56; "Concerto of Two Hearts" Eu51047, 8/25/46; "Lover's Hour" E98320 4/2/56; "45th,—From Broadway to 8th Avenue," Catalogue, E96858, Eu403496, 7/12/55; catalogue E104688; "Miss Beautiful, Please Will You Be Mrs. Me?" E98691, 4/25/56, Etc.

III. After March 4, 1946, defendants infringed said copyrights by marketing: motion pictures, "High Society"; "The Opposite Sex"; "Designing Woman"; "Wings of Victory"; "Royal Wedding"; "Gigi"; "The Joker Is Wild" or "The Joker"; musicals, "Manhattan Tower"; songs, "I Want You To Want Me," which were copied largely from

plaintiff's copyrighted books/music by and in the following manner and means:

1. Plaintiff sent to Broderick Crawford Vols. I, II of "45th,—From Broadway to 8th Avenue," discussing with defendant to become manager for plaintiff and properties asking Broderick Crawford "show it to Frank Sinatra, see what he thinks," and charges permitting plagiarism, participating therein, willful infringement for profit, Adverse Possession held contrary to order of owner to return, and adherence to felonious conspiracy to damage and deprive the plaintiff against Broderick Crawford.

2. Plaintiff submitted "The Gettysburg Hymn" to the Republican National Committee for performance at the Republican National Convention, 1956, therewith submitting program propounded in private letters,—copyright—requesting that the artists of the United States for the first time in history,—original and unusual,—copyright—now be invited before the conventions to sing "The Gettysburg Hymn" in [3] various voices at various sessions thereof. Plaintiff submitted the same program to the Democratic National Committee. The Republican National Committee acknowledged, plaintiff communicated his whole plans, furnished and fashioned in format, — copyright, — by Act, 1952. The plaintiff requested Frank Sinatra first, this artist to have the highest honor of any artist in all history, the first appearance before the largest audience ever assembled, first full Television broadcast-

ing of the National Conventions of the United States, 1956. Plaintiff further fully informed singers personally of program historically originating hereupon, Frank Sinatra informed through the William Morris Agency (below).

3. Warned of infamous infringement and the peril to properties of the plaintiff, George Murphy, Chairman, Entertainment Committee, Republican National Convention, 1956, proceeded with plagiarism, willful infringement of copyright, felonious conspiracy to damage and deprive charged against George Murphy therefor.

4. Dore Schary, Frank Sinatra, the former Chairman, Entertainment Committee, the Democratic National Convention, 1956, the latter singer, proceeded with plagiarism, and in concert with William Morris Agency, Moe Attenberg, Irving Lazar, George Wood, and H. Sanicola are charged with plagiarism, willful infringement, concretion of felonious conspiracy to damage, deprive, and are charged with an act of malice,—the evil intent to injure,—for: General and flagrant, felonious and compound conspiracy against person and properties of plaintiff emerges: Within 10 days of the above acts it was exposed that every known work available to, discoverable by the defendants was plagiarized and infringed, counterfeited and copied by Loew's, Inc., owners of Metro-Goldwyn-Mayer Studios and others employing Dore Schary, "Production Chief," and Frank Sinatra employed thereby as:

5. William Morris Agency et al., by fraud, operation of confidence game, counterfeited and copied, superarrogated works of plaintiff, sold, simulated, suggested, submitted, templated and transferred, educing, encouraging and effecting motion picturizations of plaintiff's properties, profiting from contexts and clients, instrumenting, insinuating and installing clients appearing thereby in properties communicated in criminal misappropriation for their commercial advantage of belongings, benefits and properties of plaintiff, prejudging sale, prehending profits and superseding the objects of the original works by plagiarism, the criminal offense of [4] willful infringement for profit 55 counts (or, works of Edward Dunbar O'Brien in various versions, 141 counts) the whole acts flagrant and felonious conspiracy and compound conspiracy to injure and impair, damage and deprive, defendant Dore Schary 35 counts (or 91) herein, Frank Sinatra 33 counts (71) Sammy Kahn, Nicholas Brodzsky in this jurisdiction 33 counts respectively, and charges the same and violation of the Competition Acts, trust laws, being combined with others to close commerce and lawful livelihood to another warranting Federal Probation for continuation in business or dissolution as a business made against Capitol Records, Incorporated, recorders of music in the motion pictures at issue and element in combination in restraint of trade,—the obstruction of the originals to the purpose of plagiarism thereof.

6. Charges the same, plagiarism, willful infringement for profit, flagrant and felonious con-

spiracy and compound conspiracy, Federal Probation proscriptive of putative policies warranted, are laid against Samuel Goldwyn, Louis B. Mayer, Sol Siegel, practitioners of the policies and the same against R. Monta, officer of Loew's, Inc., and additional charges,—with willful and malicious intent to injure, fraud, intimidation and conspiracy to commit criminal libel against the plaintiff.

7. Charges the same against Milton H. Rudin, defendant-representative of Frank Sinatra — conspiracy to commit criminal libel against plaintiff,—threatening, attempted intimidation, grossly distorting and maliciously misrepresenting public statements of plaintiff.

8. Gordon Jenkins pirated, plagiarized, plundered the whole work "Heartstrings, — Music On The Heartstrings" of plaintiff in story and songs 6 scenes, 31 counts (124) of plagiarism, the criminal offense of willful infringement for profit, in adherence to felonious conspiracy and compound conspiracy to damage and deprive the plaintiff.

9. The Academy of Motion Picture Arts and Science (1957) exploited by multiple combination of defendant concerting to commit felonious conspiracy to humiliate and harm, damage and deprive the plaintiff and defraud the general public (plaintiff is merely pleading before Courts of several jurisdictions for relief, plagiarism is prizewinning) therefore plagiarism, fraud, the criminal offense of willful infringement for profit and felonious conspiracy and compound conspiracy to injure and

impair, damage and deprive the plaintiff charged against George Seaton, president [5] thereof, Bing Crosby also charged therewith therefor.

10. Celeste Holm, Sidney Blackmer, Margalo Gilmore, June Allison, Ann Sheridan, Charlotte Greenwood, Ann Miller, Jeff Richards, Fred Astaire, Jane Powell, Helen Rose, George Welles, Gregory Peck, Lauren Bacall, Dolores Gray, Jack Webb, Reginald Rose, demonstrating adherence thereto are charged with adherence to plagiarism, willful infringement for profit, felonious conspiracy and compound conspiracy to damage and deprive the plaintiff, all being jointly and severally liable at infringement.

11. Louella Parsons, Hedda Hopper, at conscious writing and publication of fraud to damage and deprive the plaintiff, deceive the general public, are charged with adherence to plagiarism, willful infringement for profit and felonious conspiracy and compound conspiracy to damage and deprive, injure and impair the plaintiff.

12. Copies of plaintiff's books/music and defendants' infringements are before the instant Court of jurisdiction (elements in the Cause to trial October 14, 1957, Chicago, Illinois, United States District Court, Northern District of Illinois).

IV. Wherefore Plaintiff Demands: (1) That defendants, agents and servants be enjoined during pendency of this action and permanently from infringing said copyrights in any manner. (2) Defendants be required to pay to plaintiff damages in

consequence of defendants infringements and increase of damages hereupon declared for necessities of the present Complaint and actions associated therewith and to account and pay over all gains, profits and advantages derived by defendants from their infringements of plaintiff's copyrights are such damages as to the Court shall appear proper within the provisions of the copyright statutes. (3) Defendants be required to deliver up to be impounded during pendency of this action all copies in their possession or under their control infringing said copyrights and to deliver up for destruction all infringing copies, plates, molds, and other matter for making such infringing copies. (4) Defendants pay to the plaintiff costs of this action and reasonable attorneys fees to be all wed to the plaintiff by this Court. (5) That plaintiff have such other and further relief,—penal provisions,—as is just in accord with the charges.

/s/ EDWARD DUNBAR O'BRIEN. [6]

Trial By Jury Is Demanded in the enclosed Cause, Edward Dunbar O'Brien v. Frank Sinatra, et al.

/s/ EDWARD DUNBAR O'BRIEN. [7]

Duly Verified. [8]

[Endorsed]: Filed October 8, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS OR FOR MORE DEFINITE STATEMENT, OF DEFENDANTS FRANK SINATRA, H. SANICOLA, WILLIAM MORRIS AGENCY, INC., AND MILTON A. RUDIN, INCORRECTLY SUED HEREIN AS MILTON H. RUDIN

To Plaintiff, Edward Dunbar O'Brien, Appearing in Propria Persona:

Please Take Notice that on November 12, 1957, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, before the Honorable Peirson M. Hall, United States District Judge, in Courtroom No. 1, United States Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, defendants Frank Sinatra, Henry Sanicola, William Morris Agency, Inc. and Milton A. Rudin will move to dismiss the within action as to themselves and themselves only, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the grounds that the Court has no jurisdiction over the subject matter of the action, and on the further grounds that plaintiff's Complaint on file herein fails to state a claim [9] against said defendants, or any of them, upon which relief can be granted.

Please Take Further Notice that said defendants will further move said Court to require plaintiff to provide a more definite statement of the nature of the claims asserted by plaintiff in said action, and that said claims be separately stated.

Said motions will be based upon the plaintiff's Complaint, this Notice, and the Memorandum of Points and Authorities filed concurrently herewith, and all of the records, pleadings and documents on file in the within action.

Dated: October 31, 1957.

GANG, TYRE, RUDIN & BROWN,
MARTIN GANG,
PAYSON WOLFF,
/s/ By PAYSON WOLFF,
Attorneys for Moving Defendants. [10]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 1, 1957.

United States District Court, Southern District of California, Central Division

No. 1161-57-PH Civil

[Title of Cause.]

MINUTES OF THE COURT

Date: Nov. 12, 1957, at Los Angeles, Calif.

Present: Hon. Peirson M. Hall, District Judge; Deputy Clerk: S. W. Stacey; Reporter: Agnar Wahlberg; Counsel for Plaintiff: No appearance; Counsel for Defendants Frank Sinatra, et al.: Payson Wolff.

Proceedings: For hearing on motion of Frank Sinatra, Henry Sanicola, William Morris Agency, Inc., and Milton A. Rudin to dismiss.

Court hears statement of counsel for defendants Frank Sinatra, Henry Sanicola, William Morris Agency, Inc., and Milton A. Rudin on motion to dismiss. Court Orders said motion to dismiss granted.

And, on the Court's own motion, It Is Ordered that the case is dismissed as to all other defendants on the ground that it fails to state a claim for lack of jurisdiction, and for want of prosecution, without leave to amend.

Counsel for defendants Frank Sinatra, et al., will prepare and present formal order.

JOHN A. CHILDRESS,
Clerk,
/s/ By S. W. STACEY,
Deputy Clerk. [23]

In the United States District Court, Southern District of California, Central Division

Civil No. 1161-57 PH

EDWARD DUNBAR O'BRIEN, Plaintiff,

vs.

FRANK SINATRA, H. SANICOLA, et al.,
Defendants.

ORDER GRANTING MOTION TO DISMISS AND JUDGMENT OF DISMISSAL

This cause came on to be heard before the above-

entitled Court, the Honorable Peirson M. Hall, United States District Judge presiding, on the motion of defendants Frank Sinatra, Henry Sanicola, William Morris Agency, Inc., and Milton A. Rudin to dismiss the within action as to said defendants on the grounds that the Court has no jurisdiction over the subject matter of the action, and on the further grounds that plaintiff's complaint on file herein fails to state a claim upon which relief can be granted. Said motion was heard on November 12, 1957, the plaintiff failing to appear, and Gang, Tyre, Rudin & Brown, Martin Gang and Payson Wolff, by Payson Wolff, appearing for moving defendants Frank Sinatra, Henry Sanicola, William Morris Agency, Inc., and Milton A. Rudin; the Court being fully advised finds that the Court has no jurisdiction [24] over the subject matter of the action; that plaintiff's complaint fails to state a claim against said moving defendants upon which relief can be granted; and that plaintiff has failed to prosecute the within action by his failure to appear and defend against the aforesaid motion. The Court further, of its own motion finds that the claims as alleged against the moving defendants cannot be separated from those against the other named defendants herein; that the Court has no jurisdiction over the subject matter of the action as against all named defendants herein; that plaintiff's complaint fails to state a claim against any of the named defendants herein upon which relief can be granted. Now Therefore:

It Is Hereby Ordered, Adjudged and Decreed

that the motion of defendants Frank Sinatra, Henry Sanicola, William Morris Agency, Inc., and Milton A. Rudin to dismiss plaintiff's complaint upon the grounds above stated be and it is hereby granted, and said motion is granted upon the further ground of plaintiff's failure to prosecute the within action.

It Is Hereby Further Ordered, Adjudged and Decreed that the above-entitled action be dismissed against defendants Frank Sinatra, Henry Sanicola, William Morris Agency, Inc., and Milton A. Rudin, without leave to amend.

It Is Hereby Further Ordered, Adjudged and Decreed that, upon the Court's own motion and upon the grounds above stated, plaintiff's complaint be and the same is hereby dismissed as against all defendants, without leave to amend.

It Is Hereby Further Ordered, Adjudged and Decreed that the defendants Frank Sinatra, Henry Sanicola, William Morris Agency, Inc., and Milton A. Rudin have judgment against plaintiff Edward Dunbar O'Brien for costs and disbursements [25] in this action, to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of $..........

Dated: November 21st, 1957.

/s/ PEIRSON M. HALL,
United States District Judge. [26]

Affidavit of Service by Mail Attached. [27]

[Endorsed]: Filed November 21, 1957. Entered November 22, 1957.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To Edward Dunbar O'Brien, plaintiff:

Please Take Notice that on November 22, 1957, the Order Granting Motion For and Judgment of Dismissal, against plaintiff and in favor of defendants was entered in the above-entitled action.

Dated: November 25, 1957.

GANG, TYRE, RUDIN & BROWN,
MARTIN GANG,
PAYSON WOLFF,
/s/ By PAYSON WOLFF,
Attorneys for Moving Defendants. [28]

Affidavit of Service by Mail Attached. [29]

[Entered]: Filed November 26, 1957.

[Title of District Court and Cause.]

NOTICE OF AND MOTION TO VACATE ORDER OF NOVEMBER 12, 1957, HOLD MOVING DEFENDANTS AND THEIR ATTORNEYS IN CONTEMPT OF COURT THEREFOR AND GRANT LEAVE TO PLAINTIFF TO AMEND COMPLAINT

Notice

Please Take Notice that I file with the Clerk of the United States District Court for the Southern District of California, Central Division, in the

United States Postoffice and Court House Building, 312 North Spring Street, Los Angeles, California, this day the enclosed and thereby move the Court:

1. To vacate the order of November 12, 1957, Granting Motion to Dismiss and Judgment of Dismissal;

2. Hold moving defendants and their attorneys in Contempt of Court therefor;

3. Grant leave to plaintiff to amend the Complaint;

and that I further file: Plaintiff's Memorandum in Answer to Memorandum in Support of Alternative Motions to Dismiss or For More Definite Statement of Moving Defendants Frank Sinatra, H. Sanicola, Milton A. Rudin, and Moe Attenberg, Irving Lazar, George Wood, incorrectly represented therein as "William Morris Agency, Inc."

Dated: November 19, 1957.

/s/ EDWARD DUNBAR O'BRIEN.

To: Gang, Tyre, Rudin & Brown, 6400 Sunset Boulevard, Los Angeles 28, California, attorney for Frank Sinatra, H. Sanicola, Milton A. Rudin and Moe Attenberg, Irving Lazar, George Wood or "William Morris Agency, Inc."

Samuel Goldwyn, R. Monta, Dore Schary, George Murphy, Sol Siegel, Sammy Kahn, Nicholas Brodszky, Bing Crosby, Celeste Holm, Sidney Blackmer, Margalo Gilmore, June Allison, Ann

Sheridan, Ann Miller, Charlotte Greenwood, Jeff Richards, Fred Astaire, Jane Powell, Helen Rose, George Welles, Gregory Peck, Lauren Bacall, Dolores Gray—Metro-Goldwyn-Mayer Studios, 10202 Washington Boulevard, Culver City, California.

Jack Webb, Reginald Rose, Warner Brothers Studios, 4000 West Olive, Brb., Los Angeles, California.

Capitol Records, 1750 North Vine Street, Hollywood, California. Gordon Jenkins, c/o NBC-TV, Sunset & Vine, Hollywood, California. Broderick Crawford, 183 Tigertail Road, Los Angeles 49, California. George Seaton, 5451 Maraton, Hollywood 38, California. Louella Parsons, International News Service, Hollywood, California. Hedda Hopper, Chicago Tribune Press Service, Hollywood, California. [31]

[Title of District Court and Cause.]

MOTION

Plaintiff Edward Dunbar O'Brien moves the Court hereby:

1. To vacate the order of November 12, 1957, Granting Motion to Dismiss and Judgment of Dismissal;

2. Hold the moving defendants and their attorneys in Contempt of Court therefor;

3. Grant leave to plaintiff to amend the Complaint;

on the following grounds:

1. Plaintiff does indeed not fail to prosecute the within action, nor will he fail to prosecute or to appear upon any just and accessible Notice.

Plaintiff received the within Notice and Memorandum on November 12, 1957, in Chicago, Illinois, same day and date, so postmarked, and hours later than the moving attorneys appearance in Los Angeles, California, precluding any physical possibility of appearance in the above-entitled Court, the moving [32] defendants and their attorneys aware and informed of plaintiff's departure from Los Angeles, California, awaiting their answers to Complaint against them.

The moving defendants and their attorneys have accordingly attempted to secure rulings of the Court by stealth in the known absence of the plaintiff, known unavailability to communication, and by affording the Court selected "exhibits" (surreptitious inquiries) of no value and wholly negated by ten (10) months of subsequent rulings by the hearing Court in other (Illinois) action, all favorable to the plaintiff to the present and including refusal of the Court fully informed, to entertain any dismissal of any defendants even where jurisdiction is not acquired.

2. Plaintiff is ill (disabled), condition seriously aggravated by doings of these defendants and their

attorneys, doings forcing the plaintiff to bring this to the attention of the Court, the present doings being not the first time plaintiff has been confronted with the most callous advantage-taking of this condition (an element in the original actions, — the thought that plaintiff was disabled from protecting himself). In these circumstances and due to the defendants actions plaintiff's funds are extremely restricted, the plaintiff pleads hardship against the defendants in the present Court as in other (Illinois) action, nevertheless has effortfully traveled to seek relief in several Courts and will do so again at any accessible date directed by the present Court.

3. Plaintiff could ill-anticipate that moving defendants and attorneys, in possession of hundreds of papers giving definition to the cause against them—all of which will be introduced in evidence,—could appear to solicit the Court for more "definite statement." Plaintiff does not suggest universal jurisdiction, but summons only those defendants herein in the jurisdiction of the present Court.

4. Plaintiff cites that the moving defendants and their attorneys have [33] falsified intelligence to the Court. They are in full possession of all documents in other (Illinois) action, which is in pre-trial conference in Chicago, Illinois, and requires the plaintiff's presence there.

5. The moving defendants and their attorneys, falsifying intelligence, have denied their full possession of information from the plaintiff, other defendants, and from the Court (Illinois), thus

have misinformed and mal-advised the present Court issuing the order of November 12, 1957, withholding fifteen (15) months of full information from the Court's appraisal and causing the Court to act upon improper, inaccurate, untruthful and inadequate intelligence, placing themselves not in possession of a viable order but in contempt of Court.

It is submitted that the Court cannot consider an order of dismissal where the previous (Illinois) Court, fully informed, and a Circuit Court of Appeals have resolved that the whole Cause go to trial.

Wherefore the plaintiff moves the Court to:

1. vacate the order of November 12, 1957 Granting Motion to Dismiss and Judgment of Dismissal;

2. find the moving defendants and their attorneys in Contempt of Court therefor;

3. and grant leave to plaintiff to amend the Complaint, the very force and attempted fright of the order submitted the Court to sign appealably impinges upon fundamental rights, denying all rights and remedies for relief, without hearing.

Dated: November 20, 1957.

/s/ EDWARD DUNBAR O'BRIEN. [34]

Duly Verified. [35]

Affidavit of Service by Mail Attached. [36]

[Endorsed]: Filed December 6, 1957.

[Western Union]

Telegram

LA108—L L LSM310
(L CA 441) RX PD AR—Chicago, Ill. 27 455PMC

Hon. Peirson M. Hall, Judge of the U. S. District Court, U. S. Court House, Losa (TB).

Reference O'Brien versus Sinatra Number 1161-57-PH. On Advice submit ex parte order entered and Plaintiff Motion to Vacate ten days refused not filed as not compliance with rules. We at loss so what rules. Respectfully request be informed motion be properly and promptly filed in full compliance therewith.

Edward Dunbar O'Brien,
7020 Jeffery Blvd.,
Chicago 49, Ill. [37]

[Title of District Court and Cause.]

NOTICE OF HEARING ON MOTIONS TO VACATE THE ORDER OF NOVEMBER 12, 1957, HOLD MOVING DEFENDANTS AND THEIR ATTORNEYS IN CONTEMPT OF COURT THEREFOR, AND ORDER DEFENDANTS TO ANSWER OR OTHERWISE PLEAD OR GRANT PLAINTIFF LEAVE TO AMEND THE COMPLAINT

Please Take Notice that I file this Notice of Hearing on January 6, 1958, at 10:00 o'clock A.M., with the Clerk of the United States District Court

for the Southern District of California this day for hearing before the Honorable Peirson M. Hall, Judge of the United States District Court, in Courtroom No. 1, United States Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, of plaintiff's motions to vacate the order of November 12, 1957, hold moving defendants and their attorneys in Contempt of Court therefor, and order defendants to answer or otherwise plead or grant leave to plaintiff to amend the Complaint (said motions and Memorandum in support thereof previously filed November 19, 1957).

Dated: December 20, 1957.

/s/ EDWARD DUNBAR O'BRIEN. [38]

To: Gang, Tyre, Rudin & Brown, 6400 Sunset Boulevard, Los Angeles 28, California, attorneys for Frank Sinatra, H. Sanicola, Milton A. Rudin, and Moe Attenberg, Irving Lazar, George Wood, or "William Morris Agency, Inc.," incorrectly represented herein.

Samuel Goldwyn, R. Monta, Dore Schary, George Murphy, Sol Siegel, Sammy Kahn, Nicholas Brodszky, Bing Crosby, Celeste Holm, Sidney Blackmer, Margalo Gilmore, June Allison, Ann Sheridan, Ann Miller, Charlotte Greenwood, Jeff Richards, Fred Astaire, Jane Powell, Helen Rose, George Welles, Gregory Peck, Lauren Bacall, Dolores Gray. Metro-Goldwyn-Mayer Studios, 10202 Washington Boulevard, Culver City, California.

Jack Webb, Warner Brothers Studios, 4000 W. Olive, Brb., Los Angeles, Calif. Capitol Records, 1750 North Vine Street, Hollywood, Calif. Gordon Jenkins, NBC-TV, Sunset & Vine, Hollywood, California. Broderick Crawford, 183 Tigertail Road, Los Angeles 49, California. George Seaton, 5451 Marathon, Hollywood 38, California. Louella Parsons, International News Service, Hollywood, California, Hedda Hopper, Chicago Tribune Press Service, Hollywood, California. [39]

Affidavit of Service by Mail Attached. [40]

[Endorsed]: Filed December 23, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION THAT SUIT BE ABATED AS TO LOUIS B. MAYER, REGINALD ROSE, DEFENDANTS

Please Take Notice that I file with the Clerk of the United States District Court for the Southern District of California, Central Division, for hearing on January 6, 1958 at 10:00 o'clock A.M., before the Honorable Peirson M. Hall, Judge of the United States District Court in Court Room No. 1 in the United States Post Office and Court House Building, 312 North Spring Street, Los Angeles, California, this day the within and thereby move the Court:

1. The death of Louis B. Mayer suggested of

record and suit be abated as to the said Louis B. Mayer.

2. At removal of residence of defendant Reginald Rose service of process is not had upon the said in the within (California) action. Service of process is had upon the said in other (New York) action and appearance entered therefor in accord with Notice of Pendency of Other Actions filed by plaintiff November 19, 1957. Therefore that suit be abated as to the said Reginald Rose in the within (California) action.

Dated: December 20, 1957.

/s/ EDWARD DUNBAR O'BRIEN. [41]

To: Gang, Tyre, Rudin & Brown, 6400 Sunset Boulevard, Los Angeles 28, California, attorneys for Frank Sinatra, H. Sanicola, Milton A. Rudin, and Moe Attenberg, Irving Lazar, George Wood, or "William Morris Agency, Inc.," incorrectly represented herein.

Samuel Goldwyn, R. Monta, Dore Schary, Sol Siegel, George Murphy, Sammy Kahn, Nicholas Brodszky, Bing Crosby, Celeste Holm, Sidney Blackmer, Margalo Gilmore, June Allison, Ann Sheridan, Ann Miller, Charlotte Greenwood, Jeff Richards, Fred Astaire, Jane Powell, Helen Rose, George Welles, Gregory Peck, Lauren Bacall, Dolores Gray,—Metro-Goldwyn-Mayer Studios, 10202 Washington Boulevard, Culver City, California.

Jack Webb, Warner Brothers Studios, 4000 W. Olive, Brb., Los Angeles, California. Capitol Records, 1750 North Vine Street, Hollywood, California. George Seaton, 5451 Marathon, Los Angeles 38, California. Gordon Jenkins, NBC-TV, Sunset & Vine Streets, Hollywood, California. Broderick Crawford, 183 Tigertail Road, Los Angeles 49, California. Louella Parsons, International News Service, Hollywood, California. Hedda Hopper, Chicago Tribune Press Service, Hollywood, California.

Affidavit of Service by Mail Attached. [42]

[Endorsed]: Filed December 23, 1957.

[Title of District Court and Cause.]

NOTICE OF RULING

To Edward Dunbar O'Brien, plaintiff:

Please Take Notice that on January 6, 1958, the above-entitled Court denied the plaintiff's Motions to Vacate the Order of November 12, 1957, Hold Moving Defendants and their Attorneys in Contempt of Court Therefor, and Order Defendants to Answer or Otherwise Plead or Grant Plaintiff Leave to Amend the Complaint.

Dated: January 7, 1958.

GANG, TYRE, RUDIN & BROWN,
MARTIN GANG,
PAYSON WOLFF,

/s/ By PAYSON WOLFF,

Attorneys for Defendants Frank Sinatra, Henry Sanicola, William Morris Agency, and Milton A. Rudin. [48]

Affidavit of Service by Mail Attached. [49]

[Endorsed]: Filed January 8, 1958.

[Title of District Court and Cause.]

ORDER REFUSING FILING OF MOTION FOR RECONSIDERATION OF ORDERS HERETOFORE ENTERED

It appearing to the court that on Nov. 21, 1957, an order Dismissing the case was entered; that thereafter and on Dec. 23, 1957, the plaintiff filed a motion to reconsider and vacate the order of Nov. 21, 1957 (Nov. 12, 1957); that said motion was set for hearing by the plaintiff on January 6, 1958; that on Jan. 6, 1958, after due consideration, the court denied said motion to reconsider and vacate; that on Jan. 20, 1958, the plaintiff presented for filing another motion to reconsider and vacate the order of Jan. 6, 1958, and of Nov. 21, 1957 (Nov. 12, 1957), and the court having considered the matter, and it appearing that a similar motion, to-wit, the motion of Dec. 23, 1957, has been denied, it is ordered that said motion and accompanying papers be not filed, but that they be returned to the plaintiff together with a copy of this order.

Dated January 20, 1958.

/s/ PEIRSON M. HALL,
U. S. District Judge. [50]

[Endorsed]: Filed January 20, 1958.

[Title of District Court and Cause.]

NOTICE OF ACTION

Please Take Notice that I file with the Clerk of the United States District Court for the Southern District of California this day this information that at the ruling of the Honorable Peirson M. Hall, Judge of the United States District Court, January 27, 1958, in the within action and the circumstances therein, a new action will be filed as promptly as possible.

Dated: January 28, 1958.

/s/ EDWARD DUNBAR O'BRIEN. [54]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Edward Dunbar O'Brien, petitioner above named, hereby appeals for hearing to review the order entered ex parte in this action by the United States District Court for the Southern District of California, Central Division, on 12 November, 1957, and re-hearing thereon denied 27 January, 1958.

Dated: February 3, 1958.

/s/ EDWARD DUNBAR O'BRIEN. [55]

Affidavit of Service Attached. [56]

[Endorsed]: Filed February 6, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 58, inclusive, containing the original:

Complaint.

Notice of Motion to Dismiss, etc.

Minute Order of Court—11/12/57.

Order Granting Motion to Dismiss and Judgment of Dismissal.

Notice of Entry of Judgment.

Notice of Motion to vacate order of Nov. 12, 1957, etc.

Telegram, of 11/27/57.

Notice of hearing on motions to vacate the order of Nov. 12, 1957, etc.

Notice of motion that suit be abated, etc.

Memorandum of Points and Authorities in opposition to motion to vacate order of Nov. 12, 1957, etc.

Notice of ruling.

Order refusing filing of motion for reconsideration of orders heretofore entered.

Memorandum of Points and Authorities in opposition to motion for re-hearing of the plaintiff's motions to vacate order of Nov. 27, 1957, etc.

Notice of Action.

Notice of Appeal.

Designation of Record on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to $1.60 has not been paid by appellant.

Dated: March 14, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15934. United States Court of Appeals for the Ninth Circuit. Edward Dunbar O'Brien, Appellant, vs. Frank Sinatra, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: March 17, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15935

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME INSURANCE COMPANY OF NEW YORK, a corporation,

Appellee,

vs.

ARTHUR F. SMALLFIELD,

Appellant.

APPELLEE'S BRIEF.

THOMAS P. MENZIES,
JAMES O. WHITE, JR.,
458 South Spring Street,
Los Angeles 13, California,
Attorneys for Appellee.

FILED
MAY 12 1958
PAUL P. O'BRIEN, CLERK

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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No. 15935

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Home Insurance Company of New York, a corporation,

Appellee,

vs.

Arthur F. Smallfield,

Appellant.

APPELLEE'S BRIEF.

Jurisdiction.

In compliance with Rule 20 (U. S. C. A. 9, Subsec. 2b) appellant states that the statutory provisions believed to sustain the jurisdiction of the District Court to render judgment and of this Court upon appeal to review the judgment are as follows:

United States Code Annotated, Title 28, Section 2201: Declaratory Judgments: Creation of Remedy.

> "In a case of actual controversy within its jurisdiction, except with respect to Federal Taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking

> such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

United States Code Annotated, Title 28, Section 1332: District Courts; Jurisdiction: Diversity of Citizenship; Amount in Controversy.

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> "(1) Citizens of different States; * * *."

United States Code Annotated, Title 28, Section 1291: Courts of Appeals: Final Decisions of District Courts.

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court."

The necessary diversity of citizenship arose from the fact that the plaintiff is a citizen of New York and the defendant is a citizen of California. The amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs of suit [R. p. 5].

Statement of the Case.

This cause has been before the United States Court of Appeals for the Ninth Circuit previously on defendant's prior appeal from judgment in favor of plaintiff. We refer to the decision of this Honorable Court reported

in 244 F. 2d 337, at page 341, in which decision this court stated:

> "The judgment is vacated and the case remanded to the district court with directions to make findings based only on the properly admitted evidence."

The remand to the district court was based upon this court's holding that the lower court had buttressed its finding that appellant was not worthy of belief in part on inadmissibility of evidence. This court stated, however:

> "Here there is evidence in the record which was properly received which adequately supports the finding that appellant was not worthy of belief. The difficulty is that this finding was buttressed by the trial court's express reliance on evidence which was not admissible." (244 F. 2d 337, at p. 341.)

On December 30, 1957 argument was presented to the district court but none of the parties requested that further evidence be heard. The district court then rendered new Findings of Fact and Conclusions of Law and based thereon, a judgment in favor of plaintiff and appellee, the Home Insurance Company, and against defendant and appellant, Smallfield. Included in the court's findings is the following:

> "And the Court, in compliance with the directions and opinion of the United States District Court of Appeals, Ninth Circuit, having considered only the following evidence, to-wit:
>
> "1) The testimony and demeanor of defendant Arthur F. Smallfield and inconsistent statements made by said Arthur F. Smallfield concerning the

manner in which he acquired the jewelry which said Arthur F. Smallfield claimed had been stolen;

"2) The testimony of defendant's mother, Ruth Mary Lipschultz, and documentary evidence impeaching portions of her testimony, and inconsistencies between her testimony and that of the defendant Arthur F. Smallfield;

"3) Testimony of the following witnesses tending to contradict defendant's testimony as to the acquisition of the jewelry covered by the policy of insurance: Irving Lipschultz, George W. Clark, Arthur Louis Smallfield, Alice Smallfield.

"4) The prior conviction of defendant Arthur F. Smallfield." [Find. of Fact and Conclusions of Law, p. 2, line 19, through p. 3, line 1.]

In summary, the court found that neither Smallfield nor his mother had an insurable interest in the items of jewelry upon which claim was made at the time the policy was issued or at the time when defendant claimed the items were stolen; that defendant filed a false and dishonest claim; that the items which defendant claimed were stolen had not been stolen; that the defendant and his mother violated the terms and conditions of the policy concerning the making of false representations and false swearing, done with the attempt to defraud the insurance company thus voiding the policy; that the defendant's affidavits presented in motion for summary judgment were presented in bad faith.

In the Judgment rendered by the district court the trial court specifically stated:

> "* * * and the court having, in compliance with the directions of the United States Court of Appeals, Ninth Circuit, removed from its consideration all of that evidence which said United States Court of Appeals stated to be inadmissible (Smallfield vs. Home Insurance Company of New York, 244 F. 2d 337), and having made and based its findings of fact and conclusions of law solely upon that evidence which said United States Circuit Court of Appeals has stated was properly considered, and the court being fully advised in the premises and good cause appearing therefor: * * *".

Summary of Argument.

Point 1: The trial court's findings and judgment are in harmony with the prior decision of this Honorable United States Court of Appeals for the Ninth Circuit.

Point 2: The trial court's findings and judgment are supported by the record.

ARGUMENT.

POINT I.

The Trial Court's Findings and Judgment Are in Harmony With the Prior Decision of This Honorable United States Court of Appeals for the Ninth Circuit.

The attack now made by appellant on the district court's findings and judgment completely ignores this court's prior decision wherein it is held that

> "* * * there is evidence in the record which was properly received which adequately supports the finding that appellant was not worthy of belief." (244 F. 2d 337, 341.)

In footnote No. 10 in the same decision this court has listed such evidence as follows:

> "*E.g.*, appellant's prior conviction, his inconsistent statements at the trial, and of course, his demeanor which the trial court could properly have considered for this purpose. 3 Wigmore, Evidence Sec. 946."

Since the points mentioned in the quoted footnote have previously been ruled upon by this court and outlined in previous briefs filed by appellee, we shall not burden this brief with a further recital of the evidence supporting the findings. In this respect this appellate court stated:

> "While the trial court could have made the same finding on the evidence which was properly admitted, it did not do so, and we cannot say that it would have done so." (244 F. 2d 337, 341.)

POINT II.

The Trial Court's Findings and Judgment Are Supported by the Record.

Appellant's argument that based on possession alone the appellant had an insurable interest is bottomed on the unstated premise that the court was required to believe that the appellant was actually in possession of the jewelry at the time of the alleged theft. The court did not so find and appellant's brief is in error in stating that such a finding was made. The record will substantiate the court's lack of confidence in the testimony of the appellant in this and other respects. (See appellee's prior brief filed November 16, 1956, pages 7 through 21, inclusive.) California Insurance Code, Section 286, provides, in part, as follows:

> "An interest in property insured must exist when the insurance takes effect, and when the loss occurs * * *".

As found by the trial court, appellant made false statements which voided the policy. The insurance policy provides:

> "This entire policy shall be void if the assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof; or in case of any fraud, attempted fraud or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

In the case of *C.I.T. Corporation v. American Central Ins. Co.,* 18 Cal. App. 2d 673, 64 P. 2d 742, the court sets

forth the California rule on the effect of a false statement under oath made by the insured as follows:

> "The defendant's sworn statement was, therefore, false, and its effect was to avoid the policy irrespective of its materiality. 'A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy.' (Civ. Code, Sec. 2611; Victoria S.S. Co. v. Western Assurance Co., 167 Cal. 348, 139 P. 807. We have seen that the policy here considered provided that a false statement under oath, whether before or after a loss, would avoid it." (P. 745.)

See also:

O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688;

Boyer v. United States Fidelity & Guaranty Co., 206 Cal. 273, 274 Pac. 56; and

Atlas Assur. Co. v. Hurst, 11 F. 2d 250.

(All of which cases are cited in Appellee's Brief filed with this court on November 16, 1956, at pages 23 and 24).

The trial court's award of attorneys' fees was proper and modest. An award of $1,500.00 was made although the appellee had requested the sum of $2,925.00 supported with a detailed itemization of the work done, which was cut almost in half by the trial court in the exercise of its discretion. The award comes squarely within Rule 56(g) of the Federal Rules of Civil Procedure providing for such an award where affidavits "are presented in

bad faith". The award was based upon the fact that the appellant did act in bad faith in that he was knowingly untruthful in the presentation of his affidavit. The fact that the same evidence was later used at trial does not remove the fact that it was the filing of appellant's affidavits which caused appellee to incur the expense of obtaining affidavits and depositions to counter the false and fraudulent affidavit presented by appellant.

The trial court's findings that there had been no theft is thoroughly supported by the evidence and irrespective of any other considerations in the case if the jewelry which is the subject of the action was not stolen the insured would have no right of recovery against the insurance company. The court found as a fact that the jewelry was not stolen and that both the insured and his mother were guilty of fraud and false swearing in claiming that it had been stolen. This court has previously held that the lower court properly received evidence adequately supporting the finding that appellant was not worthy of belief.

In *Gale v. General Casualty Co. of America,* 120 F. 2d 925 (C. C. A. Cal.), the court states:

> "Appellants contend that the court's finding of misrepresentation and concealment is not sustained by the evidence. On this issue appellants must show the court's findings are 'clearly erroneous', due regard being 'given the opportunity of the trial court to judge of the credibility of the witnesses . . .' ".

A trier of fact may reject all of a witness' testimony if it is believed that the witness has wilfully and corruptly

sworn falsely to any material fact, and the testimony of one who has been found unreliable in one issue may properly be given little weight on other issues. (See *Liberty Mut. Ins. Co. v. Thompson,* 171 F. 2d 723, 726; *N.L.R.B. v. Pittsburgh S.S. Co.,* 337 U. S. 656, 69 S. Ct. 1283, 93 L. Ed. 1602.) The rule is codified in the California Code of Civil Procedure, Section 2061(3), as follows:

> "That a witness false in one part of his testimony is to be distrusted in others."

Conclusion.

Appellee respectfully submits that the issues in this case have previously been passed upon by this court, that the trial court followed the directions of this honorable court and that the judgment should, therefore, be sustained.

Respectfully submitted,

Thomas P. Menzies,

James O. White, Jr.,

Attorneys for Appellee.

No. 15937

United States Court of Appeals

for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOWARD-COOPER CORPORATION,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

FILED

JUN 12 1958

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—5-30-58

No. 15937

United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

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Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—5-30-58

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J. P. STIRLING,
3128 N. E. Broadway,
Portland, Oregon,

For the Respondent.

United States of America Before the National Labor Relations Board, Nineteenth Region

Case No. 36—CA—724

HOWARD-COOPER CORPORATION

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), AFL-CIO

COMPLAINT

It having been charged by International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), AFL-CIO, that Howard-Cooper Corporation, herein called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth in the Labor Management Relations Act of 1947, 61 Stat. 136, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Respondent, Howard-Cooper Corporation, is an Oregon corporation having its principal office and place of business in Portland, Oregon, and plants located in the states of Washington and Oregon, in-

cluding one at Central Point, Oregon, at which plants it is engaged in selling, servicing, and repairing new and used industrial and farm machinery. In its course and conduct of its business, Respondent annually purchases products valued in excess of $10,000,000.00 of which approximately 75 per cent is shipped in interstate commerce to its plants from states other than that in which said plants are located; and Respondent annually provides services and makes sales of equipment valued in excess of $10,000,000.00.

II.

The operations of Respondent, as described in paragraph I, are in commerce and affect commerce within the meaning of Section 2 (6) and (7) of the Act.

III.

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), AFL-CIO, at all times mentioned herein is and has been a labor organization within the meaning of Section 2 (5) of the Act.

IV.

All employees employed at the Central Point, Oregon, plant of Howard-Cooper Corporation, to service, repair and maintain tractors and heavy machinery, including parts men and maintenance men, but excluding office clerical employees, salesmen, supervisors, guards, and professional employees, as defined in the Act, comprise a unit of employees appropriate for the purpose of collective

bargaining within the meaning of Section 9 (a) of the Act.

V

The Union described in paragraph III above, on or about January 4, 1956, was authorized by a majority of the employees of the Respondent in the unit described in paragraph IV above, to be the exclusive bargaining representative of the employees in said unit for the purpose of bargaining with the Respondent with respect to all matters pertaining to wages, hours, and working conditions.

VI.

The Union, on or about January 4, 1956, informed Respondent in writing that a majority of Respondent's employees in the unit described in paragraph IV had authorized the Union to represent said employees as their bargaining agent, and requested Respondent to meet and bargain with said Union respecting wages, hours and working conditions affecting said employees. At all times since said date, the Respondent has refused to bargain with said Union.

VII.

Respondent, beginning on or about January 11, 1956, has solicited the employees in the unit described in paragraph IV to deal directly with the Respondent with respect to wages, hours and working conditions, has negotiated directly with said employees with respect to wages, hours and working conditions, has interrogated said employees in groups and individually concerning their purposes in desig-

nating the Union as their bargaining representative, has instituted and sponsored among said employees a petition to repudiate said Union as their bargaining representative, has by use of threats of loss of employment induced and coerced said employees to repudiate any representation by said Union, and has promised to and did reward said employees by awarding them an increase in pay for having repudiated said Union.

VIII.

Respondent, by its activity and conduct described in paragraphs VI and VII, has been and is refusing to bargain collectively with the Union as the collective bargaining representative of Respondent's employees in the unit described in paragraph IV above in violation of Section 8 (a) (5) of the Act, and has been and is interfering with, restraining and coercing said employees in the exercise of the rights guaranteed in Section 7, in violation of Section 8 (a) (1) of the Act.

IX.

The action and conduct of Respondent, as set forth above, occurring in connection with its operations described in paragraphs I and II above, has a close and intimate and substantial relation to trade, traffic and commerce among the several states of the United States and has led to and tends to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitutes unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, issues this Complaint against Howard-Cooper Corporation, on this 25th day of May, 1956.

THOMAS P. GRAHAM, JR.,
Regional Director National Labor Relations Board, 19th Region.

[Received in evidence as General Counsel's Exhibit No. 1-D, June 25, 1956.]

[Title of Board and Cause.]

MELTON BOYD, ESQ.,
For the General Counsel.

J. P. STIRLING, ESQ.,
Portland, Oreg.,
For the Respondent.

MR. HARRY WHITESIDE,
Oakland, Calif.,
For the Union.

Before: William E. Spencer, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This proceeding, brought under Section 10 (b) of the National Labor Relations Act (61 Stat. 136), herein called the Act, against Howard-Cooper Cor-

poration, herein called the Respondent or the Company, upon charges filed by International Union, Allied Industrial Workers of America, AFL-CIO, herein called the Union, and upon complaint and answer, was heard before the undersigned Trial Examiner upon due notice in Medford, Oregon, on June 25, 26, 1956. The allegations of the complaint, denied by the answer, are, in substance, that in violation of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the Act, the Respondent on and after January 11, 1956, engaged in certain specified activity amounting to a refusal to bargain with the Union, the duly designated representative of a majority of its employees in an appropriate unit, and interference, restraint and coercion.

All parties were represented at the hearing, participated therein, and were afforded full opportunity to present and meet material evidence and to engage in oral argument and to file briefs. There were oral statements by the General Counsel and the Respondent after the taking of the evidence. No briefs were filed.

Upon consideration of the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. The business of the Respondent

Howard-Cooper Corporation, the Respondent, is an Oregon corporation having its principal office

and place of business in Portland, Oregon, and is engaged in selling, servicing, and repairing new and used industrial and farm machinery at its plants located in the States of Washington and Oregon, including one at Central Point, Oregon, where incidents alleged herein to constitute unfair labor practices occurred. In the conduct of its business, Respondent annually purchases products valued in excess of $10,000,000, of which approximately 75 per cent is shipped in interstate commerce to its plants from States other than those in which the said plants are located; and annually provides services and makes sales of equipment valued in excess of $10,000,000.

On the basis of the foregoing undisputed facts, it is found that the Respondent is engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction.

II. The labor organization involved

International Union, Allied Industrial Workers of America, AFL-CIO, is a labor organization within the meaning of the Act and admits to membership employees of the Respondent.

III. The unfair labor practices

A. The refusal to bargain

The allegations of unfair labor practices herein are based on incidents occurring in November, 1955, and January, 1956, at Respondent's plant in Central

open for employee complaints he did not know why the employees had authorized the Union to represent them. Supplementing Parker's testimony concerning his remarks, Employee Alan Bishop testified that Parker said he had no objections to unions in their proper place but they tended to lead to hard feelings and strikes, people out of work, and neighbors not speaking to each other, and that he did not believe that a third party was necessary in straightening out grievances inasmuch as the Company's doors were always open for complaints; and Employee Stanley L. Long testified that Parker said unions created hard feelings, guys standing outside the homes of workers to "beat up" on families, broken windows, soup lines.

Following his introductory remarks, as set forth above, Parker invited employees to question him concerning any grievances they might have. After some hesitation, one employee raised the question of a "coffee break," saying that he understood this was allowed at other branch plants. Parker replied that he saw no objection to it, that the employees should discuss it with the branch manager and whatever he decided would be satisfactory. Following Parker's visit the employees were granted a coffee break of 10 minutes. Other problems were raised, such as the furnishing and laundering of coveralls, and matters concerning health and accident insurance and maternity benefits. It appears that no commitments were made and no action taken relative to these matters. According to the credited testimony of Employee John G. Hennagar, he complained that an

employee had to work six months before receiving paid holidays, whereupon Parker questioned Heaton and Thrash and on learning that this was correct, told Hennagar that he, Parker, would "take care of that right there." Parker further informed these employees that the Respondent had earlier decided to grant a ten cent an hour wage increase to all employees of its branch plants, but he did not know whether the Company could legally grant it to employees of the Central Point plant with the Union "in the picture."

Following Parker's visit, Thrash had individual interviews with some of the employees, apparently on the theory that they were constrained in expressing their grievances to Parker in joint assemblage. Employee John G. Hennagar testified that Thrash said he did not think that Parker had accomplished all he was after whereupon he, Hennagar, suggested that the employees be called in one at a time. According to Hennagar, in his conversation with Thrash, it was mentioned that on some previous occasion the plant had been closed due to a strike "or some union affair." On further questioning, Hennagar testified that there was no mention of a strike and to the best of his recollection what was said was that the employees voted for union representation whereupon the shop was closed down. Thrash, though present in the hearing room, did not testify. It is found that he made the statement attributed to him by Hennager.[1]

---

[1]In a prehearing affidavit taken by a Board agent, Parker stated: I didn't tell any employee or anyone else that the Company would close its Central Point

Also on the day following Parker's visit to the Central Point plant, a petition was prepared and posted in the plant. It bore the following text:

> The undersigned employees of Howard-Cooper Corp., Central Point branch respectfully petition that no action be taken regarding union organization and representation for this shop. Said employees have met with company officials and reached an agreement regarding working conditions and wages and do not desire to make a union affiliation at this time.

The petition was addressed to the Regional Office of the Board and copies were sent to Whiteside and the Company. It was signed by nine employees.

On the basis of the testimony of Employees Donald Squire, who did not sign a union authorization card, and Charles A. Brown, Jr., who was quitting his job with the Respondent, I find that the petition resulted from conferences between these two employees and Foreman Thrash. Brown was absent from the plant on January 11 and on his return to

---

establishment or its shop there if it went union nor did I make any statements of that sort. I heard that Hi Thrash, our shop foreman at Central Point, Oregon had made some such statement. I called him about it and he admitted that he had discussed it with some of the men when they asked him about it. I told him not to make any such statements as he was just getting us into trouble with them.

There is no evidence, however, that this communication from Parker to Thrash was published to the employees, or any other communication repudiating or disavowing Thrash's statement.

his job there the following morning he was summoned to Thrash's office where the matter of the wage increase mentioned by Parker was discussed. Thrash told him, as Parker told the employees the previous day, that the increases had been agreed upon by the Respondent but that because of the Union it was doubted whether it could lawfully be put into effect at the Central Point plant. Brown told Thrash, in effect, that he was quitting his job and would like to help the employees get the wage increase. The matter of the petition was then raised. Brown testified that he did not remember whether he or Thrash made the suggestion. In any event, according to his testimony, they agreed that a petition would be the proper form to use in obtaining the wage increase. Further according to Brown, he made a rough draft of a petition, discussed it with Squire, and as a result of talks between himself, Squire and Thrash, it was decided to send copies of the petition to the Board, the Company, and Whiteside. Brown had the petition typed in Thrash's office, got the address of the Regional Office of the Board from the office manager, and about the middle of the afternoon of January 12, posted the petition next to the time clock. Squire who substituted for Thrash when the latter was absent from his job and who while acting in that capacity had certain supervisory functions, testified that he also talked to Thrash on January 12, and that between them it was generally agreed that one way to get the wage increase was to file a petition such as the one that was actually pre-

pared and filed. He testified that the matter of the petition was probably a combination of Thrash's suggestions and his own initiative.

Only two employees signed the petition on January 12, Squire and Ted C. McCoy, neither of whom had signed union authorization cards.

When he returned from a field assignment to the plant late on the afternoon of January 12, Employee Bishop saw the petition, and that evening he got in touch with Whiteside, and asked him what the employees signing union cards should do with respect to the petition. Whiteside replied that he thought the petition was for the purpose of discovering the identity of those who had authorized the Union as their bargaining representative, and it was his advice that all these employees sign it. (Apparently, it was only when he saw a copy of the petition in Portland on or about January 18, that Whiteside realized its full implications.) Bishop passed this advice on to his fellow employees who had signed authorization cards and on the following day seven additional signatures were added to the petition. In his meeting with Bishop, Whiteside also told the latter that the Union would write a letter to the Company agreeing to the wage increase. Such a letter was written, bearing the date of January 14, and the Respondent thereupon, or shortly thereafter, effectuated the wage increase with respect to the Central Point plant along with other branch plants, making it retroactive to January 9. The employees had no notification that the

wage increase would be granted until they received their pay checks at the end of the following week.

On being informed that the Respondent would enter into a consent election agreement, Whiteside at first indicated assent, but after meeting with employees of the Central Point plant on or about January 16, and learning from them details of Parker's visit to the plant on January 11, and certain benefits that had been granted as a result of that visit, and upon advice of his superiors, Whiteside ultimately declined to enter into an election agreement, and on January 23, filed a charge of unfair labor practices against the Respondent.

The foregoing virtually undisputed facts establish the refusal to bargain. At no time did the Respondent question the Union's majority and there is no basis for assuming that it had a good faith doubt of it. When Parker met with the employees of the Central Point plant he attempted to bargain directly with them individually and as a group but without union representation. Fully informed as he was of the Union's claim of representation, his purpose clearly was to avoid bargaining with the Union and to supplant collective bargaining through a chosen agent of the employees with direct bargaining between management and employees. If the Union was indeed the duly designated representative of the employees involved, such action being the negation of bona fide collective bargaining, was so clearly violative of the Act that no extended comment is necessary. Not only did Parker attempt to deal directly

labor practices. Under such circumstances the Union's representative status would remain intact and Respondent's obligation to bargain would be a continuing one.

B. The appropriate unit

All parties agree and it is found, as alleged in the complaint, that all employees employed by the Respondent at its Central Point, Oregon, plant, to service, repair and maintain tractors and heavy machinery, including parts men and maintenance men, but excluding office clerical employees, salesmen, supervisors, guards, and professional employees as defined in the Act, comprise a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.

C. The Union's majority

The parties agree and it is found that at all times material herein there were 12 employees in the aforesaid appropriate unit. One of these, J. E. Carroll, was hospitalized in November when the Union first distributed authorization cards and was not at that time nor thereafter on active duty. A new employee, Hubert Curtis, was hired in November on his job but Curtis testified that he was told at the time of his hiring that the job would revert to Carroll if and when the latter returned to active duty. The General Counsel at the hearing appeared to concede that at times material to the question of the Union's majority Carroll had a reasonable expectancy of continued employment and raised no objection to testimony of

a hearsay character tending to show that Carroll was carried on Respondent's payroll in inactive status until sometime in March, 1956, when it became apparent that he would be unable to resume his duties as an employee.

Of the 12 employees in the appropriate unit, 6 testified that on or before the union meeting of November 16, 1955, they signed cards authorizing the Union to represent them. Whiteside, the Union's representative, had misplaced or lost the original cards bearing the employees' signatures, and therefore they were not produced at the hearing. There was no showing that they could not have been produced had there been an exercise of reasonable diligence in the matter, but upon mature consideration I am persuaded that this failure to produce the original cards is not fatal to proof of a majority. The oral testimony alone of the 6 employees that they had designated the Union, if believed, would be probatively sufficient to establish that the designations were made, for it is not required that such designations be made in writing or in any prescribed form. Action, such as participating in picket line duty, might, under some circumstances, be sufficient to establish authorization. I do not think therefore that we are confronted with proof of the contents of a document calling for a strict application of the best evidence rule. Authorization forms which, according to the credible testimony, are identical with those bearing the employees' signatures, were received in evidence and I do not understand that any question is raised

that these were in fact the forms used to obtain authorizations. Two of the 6 employees testified that when they signed the authorization cards they understood that they were merely for the purpose of having a union meeting, but they admitted that at the meeting of November 16, they understood that the cards had the effect of designating the Union their bargaining representative, and they did nothing then or thereafter prior to the petition of January 12, which could reasonably be construed as revoking or modifying their assent to union representation.

A seventh employee, Richard Hachenberg, was at the time of the hearing serving National Guard duty and was therefore not available to testify. Employee Bishop testified that Hachenberg gave him an authorization card bearing Hachenberg's name for transmittal to Whiteside at the union meeting on November 16, and Whiteside testified that he received from Bishop an authorization card bearing Hachenberg's name on that occasion. The testimony was that Hachenberg attended the meeting near its close, having been detained from earlier attendance by National Guard duty. It was Bishop's further credible testimony that Hachenberg signed the petition of January 12, only after Bishop had informed him that Whiteside had advised that all those who had authorized the Union as their bargaining representative, sign it. The only two names affixed to the petition on January 12, were those of McCoy and Squire who did not sign authorization cards, and all

seven of the names affixed to the petition on the following day, after Whiteside had issued his advice through Bishop, were employees who, according to the testimony, had signed authorization cards.

Although entertaining doubts in the first instance because of the failure of Hachenberg to testify and the failure to produce the authorization card bearing his signature, on further consideration I am persuaded to the view that these omissions were not fatal, for on the basis of the credible testimony of Bishop and Whiteside and the entire circumstances disclosed by the testimony, I am convinced the Hachenberg did in fact authorize the Union to act as his bargaining representative. His action alone in handing Bishop an authorization card bearing his name for transmittal to the Union's representative appears to me to be entirely inconsistent with any conclusion except that he did thereby intend to, and did in fact, designate the Union his bargaining representative.

D. Conclusions

It is found that on January 4, 1956, when the Union requested recognition and bargaining rights, and on January 11, 1956, when the Respondent refused to recognize and bargain with the Union, the Union had been designated by a majority of employees in an appropriate unit. It accordingly is found that the Respondent in refusing to recognize and bargain with the Union violated Section 8 (a) (1) and (5) of the Act. Further, in offering induce-

ments to employees as a reward for repudiating union representation; in participating in and fostering the antiunion petition of January 12, 1956; and in Foreman Thrash's veiled threat of plant closure in the event of union authorization, the Respondent interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the severa States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

2. Since November 16, 1955, the Union has been, and now is the exclusive representative of all Respondent's employees in the following unit appropriate for purposes of collective bargaining within the meaning of Section 9 (a) of the Act:

All employees employed by the Respondent at its Central Point, Oregon plant to service, repair and maintain tractors and heavy machinery, including parts men and maintenance men, but excluding office clerical employees, salesmen, supervisors, guards, and professional employees, as defined by the Act.

3. By refusing on and after January 11, 1956, to bargain collectively with the Union as exclusive representative of employees in the above appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

4. By interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in the case, it is recommended that the Respondent, Howard-Cooper Corporation, Portland, Oregon, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive representative of all employ-

ees in the unit above found to be appropriate, with respect to rates of pay, wages, hours of work, and other conditions of employment;

(b) Discouraging membership in or activities on behalf of the Union or any other labor organization, by seeking through threats or the granting of or promise of benefits to induce its employees to repudiate or to refrain from membership in or activities on behalf of the Union, or any other labor organization;

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form and join labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of employees in the unit described above and found to be appropriate, with respect to rates of pay, wages, hours of work, and other conditions of employment, and if an

understanding is reached, embody such understanding in an agreement;

(b) Post at its place of business in Central Point, Oregon, copies of the notice attached hereto marked Appendix. Copies of the notice, to be furnished by the Regional Director for the Nineteenth Region, Seattle, Washington, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(c) Notify the Regional Director for the Nineteenth Region in writing, within twenty (20) days from the date of the service of this Intermediate Report and Recommended Order, what steps the Respondent has taken to comply therewith.

It is further recommended that, unless within twenty (20) days from the date of the service of this Intermediate Report and Recommended Order the Respondent notifies said Regional Director that it will comply with the foregoing recommendations, the Board issue an order requiring the Respondent to take the aforesaid action.

Dated this .. day of July, 1956.

/s/ WILLIAM E. SPENCER,
Trial Examiner.

Appendix

Notice to All Employees

Pursuant to

The Recommendations of a Trial Examiner

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in International Union, Allied Industrial Workers of America, AFL-CIO, or in any other labor organization, by seeking through threats or the granting of or promise of benefits to induce our employees to repudiate or to refrain from membership in or activities on behalf of the above-named or any other labor organization.

We Will Not interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form, join, or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will bargain collectively, upon request, with the above-named labor organization, as the exclusive representative of all employees in the appropriate unit, with respect to wages, rates of pay, hours of

employment and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate unit is:

All employees of the Central Point, Oregon, plant engaged in servicing, repairing and maintaining tractors and heavy machinery, including parts men and maintenance men, but excluding office clerical employees, salesmen, supervisors, guards, and professional employees as defined by the Act.

All our employees are free to become and remain members of the above-named or any other labor organization.

HOWARD-COOPER
CORPORATION,
(Employer.)

Dated ....

By ....,
(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

ERRATUM

The name of the labor organization involved in the subject case is corrected to read: International

above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following additions:

The Trial Examiner found that a majority of the Respondent's employees in an appropriate unit had designated the Union as their representative and that, therefore, the Respondent refusd to bargain with the Union in violation of Section 8 (a) (5) of the Act. The Respondent's exceptions, in the main, attack the validity of the finding of majority designation by the Trial Examiner because of the absence of direct proof that employee Hachenberg, whose designation is needed to establish the Union's majority, had authorized the Union to represent him.

Of the 12 employees whom the parties agreed were in the appropriate unit, 6 testified that they had signed cards authorizing the Union to represent them. Although the cards were not produced at the

hearing, and there was no showing that they could not have been produced through the exercise of due diligence, it is clear that the testimony of the employees involved is itself probative of the Union's majority status.[2] On the basis of their testimony, we find, as did the Trial Examiner, that these 6 employees did in fact designate the Union as their representative.

As to the crucial seventh employee, Richard Hachenberg, who allegedly also signed a card but was unable to appear as a witness at the hearing because he was serving National Guard duty, employee Bishop testified that, when he called at Hachenberg's home to offer him a ride to the Union meetting being held that evening, Hachenberg did not accompany him but gave him a union authorization card appearing to bear Hachenberg's signature for transmittal to Whiteside, the Union representative, and that he, Bishop, turned the card over to Whiteside at the meeting. Whiteside testified that among the cards he received was one bearing Hachenberg's name. Bishop also testified that Hachenberg arrived late at the meeting. He further testified that, at the beginning of the January 13 work day, he informed Hachenberg, in response to the latter's inquiry, that Whiteside advised all who had signed cards to sign the petition posted on January 12, in order to protect themselves. Subsequently, the names of the 6 employees found above to have designated the Union to represent them, and that of Hachenberg, were

[2] Idaho Egg Producers, 111 NLRB 93, 107 (IR).

added to the petition. Like the Trial Examiner, we find, upon the basis of the foregoing uncontroverted evidence, and the record as a whole, that Hachenberg had also designated the Union to represent him.

We accordingly find, as did the Trial Examiner, that the Respondent unlawfully refused to bargain with the Union.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Howard-Cooper Corporation, Portland, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union as the exclusive representative of all employees at the Respondent's Central Point, Oregon, branch plant, in the unit found to be appropriate in the Intermediate Report, with respect to rates of pay, wages, hours of work, and other conditions of employment;

(b) Discouraging membership in or activities on behalf of the Union or any other labor organization, by seeking through threats or the granting of or promise of benefits to induce its employees to repudiate or to refrain from membership in or activi-

ties on behalf of the Union, or any other labor organization;

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form and join labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of employees in the unit heretofore found appropriate, with respect to rates of pay, wages, hours of work, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement;

(b) Post at its place of business in Central Point, Oregon, copies of the notice attached hereto.[3]

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[3]If this Order is enforced by a United States Court of Appeals, the notice shall be amended by substituting for the words "A Decision and Order," the words "A Decree of the United States Court of Appeals, Enforcing an Order."

Copies of the notice, to be furnished by the Regional Director for the Nineteenth Region, Seattle, Washington, shall, after being duly signed by Respondent's representative, be posted by the Respondent immediately upon receipt thereof, and maintained by it for a period of sixty (60) days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., Feb. 5, 1957.

BOYD LEEDOM,
Chairman;

ABE MURDOCK,
Member;

PHILIP RAY RODGERS,
Member;

STEPHEN S. BEAN,
Member.

[Seal] NATIONAL LABOR
RELATIONS BOARD.

Before the National Labor Relations Board,
Nineteenth Region

Case No. 36—CA—724

In the Matter of:

HOWARD-COOPER CORPORATION,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), AFL-CIO

TRANSCRIPT OF PROCEEDINGS

Monday, June 25, 1956

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a.m.

Before:

WILLIAM E. SPENCER,
Trial Examiner.

Appearances:

MELTON BOYD, ESQ.,
Appearing on Behalf of General Counsel,
National Labor Relations Board.

J. P. STIRLING, ESQ.,
Appearing on Behalf of Howard-Cooper Corporation, the Respondent.

HARRY WHITESIDE,

Appearing on Behalf of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), AFL-CIO, the Charging Party.

Trial Examiner Spencer: The hearing is in order.

This is a formal hearing before the National Labor Relations Board in the matter of Howard-Cooper Corporation and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), AFL-CIO, Case No. 36-CA-724.

The Trial Examiner appearing for the National Labor Relations Board is William E. Spencer.

I note the following appearances: For the General Counsel, Melton Boyd, Esquire; for the Respondent, J. P. Stirling, Esquire, of Portland, Oregon; for the Charging Union, Harry Whiteside, Oakland, California.

Mr. Whiteside, I take it you are not an attorney?

Mr. Whiteside: No, sir. [3*]

* * *

Mr. Boyd: I will make available to the Trial Examiner at this time document marked for identification General Counsel's Exhibit 1, being made up of the following included documents, which I ask the Reporter to mark A, B, C, in sequence:

1-A, being the charge against the employer, filed

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

on January 23rd; B, the proof of service thereof; C, the notice of hearing upon this complaint; D, the complaint itself; E, the proof of service of the complaint, charge and notice of hearing and F, the answer of the Respondent.

(Thereupon, the documents above referred to were marked General Counsel's Exhibits Nos. 1-A to 1-F, inclusive, for identification.)

Mr. Boyd: These documents are in duplicate in General [4] Counsel's Exhibit 1, and I offer them in this record and in evidence.

Trial Examiner: Do you have any objection, Mr. Stirling?

Mr. Stirling: I have no objection.

Trial Examiner: They are received.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A to 1-F, inclusive, for identification, were received in evidence.)

Mr. Boyd: May I bring to the Trial Examiner's attention the answer of the Respondent is a general denial of all matters alleged in the complaint.

Trial Examiner: That includes jurisdiction, I take it?

Mr. Boyd: It does, but I have discussed this matter with Counsel, and I believe I'm correct in the following, and I ask him to verify it as I proceed:

The allegations of paragraph numbered I, which are the commerce facts, they will now stipulate are to be admitted as a fact.

Mr. Stirling: That's right.

Mr. Boyd: The allegations of Paragraph II, a legal conclusion that the operations of the employer affect commerce, they are stipulating to that, admitting that to be the effect of the employer's operations. Is that correct?

Mr. Stirling: That's right.

Mr. Boyd: Paragraph III, the status of the [5] labor organization, as a labor organization, they're admitting that to be a fact.

Mr. Stirling: That's right.

Mr. Boyd: Paragraph numbered IV, description of the unit of employees appropriate for collective bargaining, they're admitting that that is an appropriate unit, and it may be so found by the Board.

Mr. Stirling: It may be so stipulated.

Mr. Boyd: Paragraph numbered VI alleges certain information. It's my understanding that they will admit fully the allegations of paragraph numbered VI.

Mr. Stirling: No, I don't believe that's so, Mr. Boyd. We would admit that we did receive a letter from Mr. Whiteside. Whatever conclusions may be drawn from that may be——

Mr. Boyd: Rather than develop that by a stipulation, it's so brief and it will come into the testimony, and we'll proceed from there with the adducing of evidence.

Trial Examiner: All right. Then the matter of commerce, status of the union as a labor organization, and the appropriateness of the unit as alleged in the complaint, are matters that are stipulated to?

Mr. Boyd: That is right.

Mr. Stirling: That's right.

Mr. Boyd: I would call as our first witness, if the Trial Examiner is ready, Mr. Whiteside. [6]

HARRY WHITESIDE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Your name is what?

A. Harry Whiteside, International Representative, United Auto Workers.

Q. Were you so employed in the latter part of last year and the early part of this year?

A. Yes.

Q. In what capacity?

A. International Representative.

Q. And in what area were you—to what area were you assigned at that time?

A. I was assigned Oregon since April of 1955 through February the 2nd.

Q. Of '56? A. Yes.

Q. At the present time, to where are you assigned?

A. I'm assigned to Salt Lake temporarily.

Q. And is any other representative of the UAW assigned now to this territory?

A. No. We're using national AFL-CIO representatives.

(Testimony of Harry Whiteside.)

Q. Directing your attention to the operations of the Howard-Cooper Corporation at Central Point, Oregon, did you in your [7] capacity as a representative of the UAW-CIO make any effort to organize the employees of that company? A. Yes.

Q. When?

A. Approximately November 7th is when I first delivered the leaflet book to the fellows at the plant at their work.

Q. That's last year, 1955? A. Yes.

Q. What was that which you delivered to them?

A. I delivered leaflets, and stapled to it an authorization card.

Q. Now, did you get back from any of them these authorization cards?

A. The first delivery that I can recall, I think I received none the first delivery. Then approximately around the 16th of the month, I called a meeting and in between the 7th and the 16th I had been handed one or two cards, but by the meeting of the night of the 16th, I had seven. Some had been mailed; some had been handed to me.

Q. I hand you a document marked for identification General Counsel's Exhibit No. 2 and ask you to state whether that is the form of the card that you issued with your literature on the night of November 7th? A. Yes, this is the type of card.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 2 for identification.) [8]

(Testimony of Harry Whiteside.)

Q. In the form that you got the cards from the employees? A. Yes.

Mr. Boyd: I offer in evidence General Counsel Exhibit No. 2.

Mr. Stirling: Let's see the card he looked at.

Mr. Boyd: All right.

Mr. Stirling: I have no objection.

Trial Examiner: Received.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 2

Mail This Card Today

Authorization for Union Representation Under the Federal Labor Laws of the United States Government!

Do you want the UAW-CIO to bargain for you for a signed labor contract providing for wage increases, better vacation pay, job security, and other improved conditions of employment?

YES ☐ No ☐ Date........

My Signature.................... Phone..........
(Write—do not print)

My Address ....
City......................... Zone No..........
I am employed by......Co.....How long?........

(Testimony of Harry Whiteside.)

Kind of work I do............Dept.............

Present Wage Rate $..........

I am on: Day ☐ Swing ☐ Graveyard ☐ Shift

Drop This Filled-Out Card in the Mail Box Today!

All cards are kept confidential by the UAW-CIO and by the Federal Government.

Received in evidence June 25, 1956.

Q. (By Mr. Boyd): Having received these cards from the seven individuals, what action did you then take in November of 1955?

A. Well, at the meeting, I explained to the fellows the meaning of the card, and, at the end of the meeting, request of the fellows in the shop was that I hold up the cards until after the first of the year, until after they had had their holidays, and had been paid for it, plus that the company may give them a turkey at Christmas at a party. They didn't want to have it stymied, and to hold the election up.

Q. So, no action was taken at that time in compliance with their request? A. That's right.

Q. You say that you received seven of these cards? A. Yes.

Q. Where are the cards that you received? [9]

A. The cards that I received are now in all possibility with the fellow I turned my files over to when I left, which is Ken Gilley, which is now sta-

(Testimony of Harry Whiteside.)

tioned in San Diego, and is on a two-week vacation. He's gone three weeks.

Q. When did you learn that you did not have them in your files?

A. When I received the letter for—well, when I found out I didn't have them in my file was just about four or five days ago, when I was going through the files.

Q. And the last search you made was when?

A. Sunday.

Q. Sunday, this last week end?

A. I went over my files on Sunday, this last week.

Q. Do you recall the names of the seven people from whom you secured cards? A. Yes.

Q. Will you state their names, please?

A. May I make a statement first, or shall I make a statement of the names? I'll make a statement of the names. One was Bishop—by the way, Mr. Hearing Officer, I can't recall all the first names.

Trial Examiner: Yes, just to the best of your recollection.

The Witness: Yes. Bishop, Billups——

Trial Examiner: What's that second one?

The Witness: Billups. [10]

Mr. Boyd: B-i-l-l-u-p-s.

The Witness: Brown, Long, Henagar, and I think Hamburg.

Q. (By Mr. Boyd): That is Hachenberg, I believe the testimony will develop—H-a-c-h-e-n-b-e-r-g.

(Testimony of Harry Whiteside.)

A. Is that seven?

Trial Examiner: No; that's five, the way I get it.

Mr. Stirling: Six.

Trial Examiner: I have Bishop, Billups, Brown, Long, Hachenberg.

Mr. Boyd: And Henagar, he mentioned.

Trial Examiner: Oh, that's an additional one. I thought you were correcting the spelling.

Mr. Boyd: No. I was correcting the spelling and pronunciation of Hachenberg.

Trial Examiner: That makes six.

Q. (By Mr. Boyd): There's one more?

A. Well——

Q. Let me point to the individual in the seat second from the end back here on the front row.

A. Curtis. That's correct.

Q. Then it's my understanding from your testimony that each of these seven named persons had given you a card authorizing you to represent them in bargaining? A. Yes.

Q. But you took no action on it until after the first of the [11] year? A. That's correct.

Q. Now, I hand you a document marked for identification as General Counsel's Exhibit No. 3 and ask whether you can identify that document?

A. Yes.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

(Testimony of Harry Whiteside.)

Q. (By Mr. Boyd): What do you identify General Counsel's Exhibit 3 to be?

A. That's the letter of recognition and asking for bargaining rights.

Q. And that was—what did you do with that letter?

A. I mailed that to Mr. Heaton, the plant manager, on January 4th.

Mr. Boyd: I offer in evidence General Counsel's Exhibit No. 3.

Mr. Stirling: I have no objection.

Trial Examiner: Received.

(The document heretofore marked General Counsel's Exhibit No. 3 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 3

Address reply to:

Harry Whiteside, International Representative,
Region No. 6, UAW-AFL-CIO,
404 Woodlark Building,
Portland 5, Oregon.

Ph.: CApitol 3-0365.

January 4, 1956.

Howard Cooper Sales & Service,
419 North Pacific Highway,
Central Point, Oregon.

Attention: Mr. H. R. Heaton, Manager.

(Testimony of Harry Whiteside.)

Gentlemen:

You, and each of you, are hereby notified that the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO), affiliated with the American Federation of Labor and Congress of Industrial Organizations, now represent a majority of your production, service, repair, and maintenance employees.

We request that you recognize us as the exclusive representative of the above-named employees for the purposes of collective bargaining.

We also advise you not to enter into any agreement or recognize any other agent of collective bargaining as the representative of these employees until and unless certified by the National Labor Relations Board.

Please contact the writer at the address shown above so that we may arrange a mutually agreeable time to meet for the purpose of discussing this matter and perhaps begin negotiations for a labor contract for your employees.

Very truly yours,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO),

Affiliated with the AFL-CIO;

By /s/ HARRY WHITESIDE,
International Representative.

(Testimony of Harry Whiteside.)

Copy to:
NLRB—Seattle, Portland.

Received January 6, 1956.

Received in evidence June 25, 1956.

Q. (By Mr. Boyd): Did you receive a reply to that letter? A. No reply was sent to me.

Q. Following the elapse of time, in which you received no reply, what did you do? [12]

A. Well, I waited till the following week on Monday to receive the following Monday morning's mail to see if the company had mailed me any recognition or answer, and, getting no answer through Monday, I drew up a petition to the National Labor Relations Board and filed it on Tuesday, filed for an election and submitted the cards.

Q. I hand you a document marked for identification General Counsel's Exhibit 4 and ask whether you can identify that document, as to whether that document is a conformed copy of an original signed by you?

A. This is a copy of the petition I filed.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. (By Mr. Boyd): And that you identify as what?

A. The petition I filled out to the Board asking for an election.

(Testimony of Harry Whiteside.)

General Counsel's Exhibit No. 4—(Continued)

2. Name of Employer: Howard Cooper Corporation.

Employer Representative to Contact: H. R. Heaton, Manager.

Phone No. ....

3. Address(es) of Establishment(s) Involved (Street and number, city, zone, and State): 419 N. Pacific Highway, Central Point, Oregon.

4a. Type of Establishment (Factory, mine, wholesaler, etc): Sales & Service.

4b. Identify Principal Product or Service: Fire trucks, construction machinery, tractors.

5. Description of Unit Involved (If more space is needed, continue on another sheet)

Included: All production, service, repair and maintenance employees, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

6a. Number of Employees in Unit: 11.

6b. Is This Petition Supported by 30% or More of the Employees in the Unit: ☒ Yes ☐ No.

7a. ☐ Request for recognition as Bargaining Representative was made on January 5, 1956, and Employer declined recognition on or about: No reply received.

8. Recognized or Certified Bargaining Agent (If there is none, so state)

Name: None.

(Testimony of Harry Whiteside.)

General Counsel's Exhibit No. 4—(Continued)

9. Date of Expiration of Current Contract, if Any (Show month, day, and year): None.

10. If you Have Checked Box 1 D (UD) Above, Show Here the Date of Execution of Agreement Granting Union Shop (month, day, and year)

11. Parties or Organizations Other Than Petitioner Which Have Claimed Recognition as Representatives, and Other Unions Interested in the Employees Described in Item 5 Above (If none, so state)

Name: None.

12. If you have checked box 1 A (RC) above, list locals or other affiliates of Petitioner having or soliciting members among the employees in the unit involved; or which will serve such employees in the event the petitioner is certified as their representative (If none, so state)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), AFL-CIO,

By /s/ HARRY WHITESIDE,
International Representative.

(Testimony of Harry Whiteside.)

General Counsel's Exhibit No. 4—(Continued)

Address: 404 Woodlark Building, Portland 5, Oregon. CA. 3-0365.

Wilfully False Statement on This Petition Can Be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 1001)

Received in evidence June 25, 1956.

Q. (By Mr. Boyd): With the filing of General Counsel's 4, what additional thing did you file with the Board?

A. I filed the seven cards that I had gotten from the employees of the company.

Q. Subsequently you received them back from the Board? A. Yes; I received them back.

Q. And that, you say, took place on January 10th? A. Right.

Q. Where were you on January 10th?

A. I was in Portland.

Q. Where were you on January 11th?

A. I was still in Portland. [14]

* * *

The Witness: Mr. Brost received a call from one of the employees at the plant that the Vice President had been in town that day.

Q. (By Mr. Boyd): In what town?

A. In Central Point, in the plant.

(Testimony of Harry Whiteside.)

Q. Then what did you do? That's enough of what was reported. What did you do?

A. I notified Mr. Brost that I would be down here the next day.

Q. Well, what did you do thereafter?

A. Well——

Q. Did you go down? A. Yes.

Q. And when did you go down? [15]

A. I came down here the following day on the 12th.

Q. On the 12th of January? A. Yes.

Trial Examiner: When he says "down here," of course, that means to Medford.

Q. (By Mr. Boyd): Is that correct?

A. Central Point.

Q. Well, you came to Medford?

A. That's right.

Q. Central Point is how far from Medford?

A. I'd say about five miles.

Q. On the 12th, after your arrival, what transpired?

A. Well, I met one of the employees at the hotel.

Q. Now, that's an employee of Howard-Cooper Corporation? A. Yes.

Q. Which one? A. Mr. Bishop.

Mr. Boyd: This, that is about to be testified to, is being offered only to account for subsequent action. It is circumstantially corrobative of testimony that will subsequently be given.

Q. (By Mr. Boyd): Will you relate what occurred when you met Mr. Bishop?

(Testimony of Harry Whiteside.)

A. Mr. Bishop informed me that Mr. Parker, the Vice President of the company, had addressed the employees in the plant. [16]

Q. On what day? A. On the 11th.

Q. That's the day before?

A. The day before, and had made statements to the employees.

Q. You don't need to go into the statements. He did tell you of what Parker had said?

A. Yes.

Q. Is that right? A. Yes.

Q. Then what other matter did Mr. Bishop report to you on?

A. And that a petition had been available to the employees in the plant to sign.

Q. And what did he tell you—what did he say with respect to this petition for the employees to sign?

A. This petition, as far as he knew, was asking the Labor Board not to conduct an election.

Q. You say as far as he knew. You mean insofar as he described it to you? A. Yes.

Mr. Stirling: I am going to object again to this matter as being hearsay.

Trial Examiner: It's hearsay as to the nature of the petition, yes, sir.

Mr. Stirling: Yes.

Mr. Boyd: I will give Counsel and the Trial Examiner [17] assurance that I am going to produce the document, but the significant thing is what was

(Testimony of Harry Whiteside.)

reported to this man at that time because it accounts for his actions at that time.

Trial Examiner: We understand.

Q. (By Mr. Boyd): When Mr. Bishop reported to you that this was the nature of the petition, what more did he say then?

Mr. Stirling: I object.

Trial Examiner: Same ruling on the assumption that it's offered for the same purpose.

Mr. Boyd: It is, and Mr. Bishop will be produced as a witness.

Trial Examiner: All right.

The Witness: Well, the substance of it, of his conversation with me, was that Mr. Parker addressed this group and had said that they wanted to give the employees an increase; however, that during this time the union had been in the picture, they couldn't give an increase.

So, I informed Mr. Bishop at that time that the union did not want to take the responsibility on its shoulders to hold back the increase, and that I would write an enabling letter to the company to grant an increase as far as the union was concerned.

Q. (By Mr. Boyd): And was that the extent of your instruction to Mr. Bishop?

A. Yes, and also he asked me what the fellows should do about [18] the petition, and I instructed him to sign the petition.

Q. You instructed him to have how many sign the petition?

A. All of our fellows that signed cards.

(Testimony of Harry Whiteside.)

Q. Everybody that signed a card?

A. Yes.

Q. Did you explain why?

A. I explained the reason why, and, if they hadn't signed, the company may come to the conclusion that that was the group that did not—who had signed our cards.

Q. That was the extent of your instruction to Bishop? A. That's correct.

Mr. Boyd: I give assurance to Counsel and the Examiner that I'll tie this into subsequent action.

Q. (By Mr. Boyd): Now, this transpired on the 12th of January? A. Yes.

Q. You did not at that time see a copy of that petition? A. No.

Q. Your knowledge of it was just as imparted to you by Mr. Bishop? A. Yes.

Q. What did you do on the 13th, if anything, that related to this case of the Howard-Cooper Corporation?

A. Well, on the 13th, I tried to get hold of the Labor Board at that time, to ask a question.

Q. You accomplished nothing on the 13th? [19]

A. Nothing on the 13th.

Q. What did you do on the 14th?

A. So, I returned to my Oakland office and drafted the letter of enabling to the company. It was mailed to them on the 14th.

Q. I hand you a document marked for identification General Counsel's Exhibit No. 5 and ask you whether you can identify that document?

(Testimony of Harry Whiteside.)

A. This is the enabling document or letter that I sent.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 5 for identification.)

Mr. Boyd: I offer in evidence General Counsel's Exhibit No. 5.

Mr. Stirling: No objection.

Trial Examiner: Received.

(The document, heretofore marked General Counsel's Exhibit No. 5 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 5

United Automobile, Aircraft, Agricultural Implement Workers of America (UAW-CIO) International Union

International Headquarters: 8000 E. Jefferson, Detroit 14, Michigan.

Address reply to:

Harry Whiteside, International Representative,
Region No. 6, UAW, AFL-CIO,
404 Woodlark Building, Portland 5, Oregon.

Ph.: CApitol 3-0365.

January 14, 1956.

Howard Cooper Sales & Service,
419 North Pacific Highway,
Central Point, Oregon.

(Testimony of Harry Whiteside.)

Attention: Mr. Frank S. Parker, Vice-President;
Mr. H. R. Heaton, Manager.

Gentlemen:

It has been brought to my attention that you have informed your employees that the Company had been planning to grant them a ten-cent-an-hour wage increase, but now that the Union has petitioned for an election, you are unable to do so.

What a strange "coincidence"—the announcement of a "planned" wage increase immediately after the Company had been informed that a majority of their employees desired to be represented by the largest Union in America, the UAW AFL-CIO!

Apparently, in view of your statement, you need enabling authorization from the Union to allow you to show you are men of honor.

Therefore, you and each of you, are hereby notified that the Union has no objection to you granting your employees a ten-cent-an-hour wage increase, retroactive to any date you desire.

It is understood, of course, that the granting of any wage increase will be made free of any stated or implied obligation on the part of your employees, individually or collectively, that could or would be interpreted to mean that they should become a party to a tacit yellow-dog agreement, and/or should refrain from securing the benefits of Union represen-

(Testimony of Harry Whiteside.)

tation by the exercise of such rights as guaranteed them by the United States Government in the National Labor-Management Relations Act of 1947, as amended.

Also, to show that you have all honorable intentions of abiding by this law and will carry out your legal obligations to comply with its provisions in good faith, we urge that you abide by the wishes of a majority of your employees, and enter into an Agreement for Consent Election immediately so that your employees may, without duress, freely choose the Union representation they desire, and without undue delay.

Very truly yours,

/s/ HARRY WHITESIDE,
International Representative.

HW:nw
liu1811aflcio

Duplicate copies to:
NLRB

Howard-Cooper Employees

Received January 17, 1956.

Received in evidence June 25, 1956.

Q. (By Mr. Boyd): Now, on January—what was the next action you took thereafter that related to the situation at Howard-Cooper Corporation?

(Testimony of Harry Whiteside.)

A. Well, Monday, I was back here——

Q. In Medford?

A. In Medford, and I received a call from my Portland office, that a petition was in the office from the Howard-Cooper employees at Central Point. I had figured then at that time it was the same one that Bishop had talked to me, so I asked the [20] girl just what the contents were, what is said, and she said——

Q. Did she read it to you?

A. No; she didn't read it.

Q. What did she tell you?

A. She just said that it looks like they don't want the union to go through with an election. They sent a petition to the Board, and we have a copy. So, I told her that was all right, that I had heard about it. So, I hung up and I called the Labor Board and asked for Mr. Hedges.

Q. Mr. Hedges is a field examiner of the Labor Board? A. Yes.

Q. And why did you call for Mr. Hedges? How did you happen to call for him?

A. Well, I wanted to know——

Q. Well, had you been notified that he was the field examiner that had been assigned to the handling of your petition? A. Yes.

Q. Which was in Case No. 36-RC-1165, filed on January 10th? A. Yes. I was so notified.

Q. So, you called him? A. Yes.

Q. You called for him because of that?

(Testimony of Harry Whiteside.)

A. Yes. I wanted to know what bearing the petition would have on our petition for an election.

Q. What bearing the employees' petition would have on your [21] petition?

A. Yes, and he told me at the time it would have no bearing on the petition that I filed. So, that was the extent of the conversation.

Q. Well, now, let me understand you correctly—well, all right, we'll just let it stand. Go ahead.

A. Then in the afternoon, Mr. Hedges called me and told me that Mr. Stirling, the lawyer for the Howard-Cooper Company, had talked to him and agreed on a consent election, and would it be all right if he drew up the papers on this election case, and I notified him then that I have no objection to him drawing up the petition.

Q. Well, did you say you had no objection, or did you indicate whether you would or would not enter into a consent agreement?

A. Why, I indicated that, if he would draw it up, why, I would come in and probably would sign it.

Q. This was, you say, in the afternoon of January 14th, Monday—January 16th, Monday?

A. That's correct.

Q. Did you return to Portland immediately?

A. Yes; on the 18th.

Q. On the 18th. Well, what transpired with respect to the Howard-Cooper Corporation between the 16th, when you heard that they would enter into a consent agreement, and the 18th? [22]

(Testimony of Harry Whiteside.)

A. Why, I called a meeting of the fellows at the plant.

Q. You called it at the plant?

A. No. I called a meeting of the fellows of the plant at the Woodworkers Hall, and which we later transferred to the hotel, and I noticed when they came into the room that something had changed. So, I got into a conversation with them, and they told me that, effective as of that day or the previous day, the company had granted coffee, chocolate, tea, sugar and cream, and time to drink it on company time, which to me—I had to think it over just what the whole situation and picture would be.

So, I asked the fellows at the time and explained to them about the lawyer and the petition in Portland, and what was their position or what did they think about going ahead with an election. The answer at that time was that they didn't think we should go ahead.

Q. That is, these employees who were there?

A. Yes.

Q. This meeting was held on what date?

A. That was on the 17th. That was the day before I went to Portland.

Q. This was the evening of the 17th?

A. Yes.

Q. All right. Now, you say you went into Portland then on the 18th? A. That's right. [23]

Q. When you got to your office in Portland, tell us what took place there.

(Testimony of Harry Whiteside.)

A. The secretary gave me several letters to read. Included in this group was, No. 1, the petition——

Q. Now, this was what petition?

A. That the employees had signed and had sent to the Labor Board, as I had believed up to that time, asking not to conduct an election.

Q. And what was the other document?

A. The other document was a copy of the petition that the lawyer had signed for the consent election.

Q. That's the consent election agreement?

A. Yes.

Q. That was waiting for you in the mail?

A. Yes.

Q. I'll hand you a document marked for identification General Counsel's Exhibit 6, to see whether you can identify the document so marked.

A. I'm sure that's the——

Q. Is that the document that you had in the mail from your office—in your office upon your arrival there in Portland?

A. I'm sure it is the one, yes.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 6 for identification.)

Q. (By Mr. Boyd): This is the one you had and submitted to me, [24] wasn't it, and I handed back to you? A. Yes.

Mr. Boyd: I offer in evidence General Counsel's 6.

(Testimony of Harry Whiteside.)

Trial Examiner: What is it? The petition for consent election?

Mr. Boyd: No. This is the consent agreement which bears the signature, as testified by the witness, of Respondent's attorney.

Mr. Stirling: I have no objection.

Mr. Boyd: I offer GC-6 in evidence.

Trial Examiner: Received.

(The document, heretofore marked General Counsel's Exhibit No. 6 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 6

United States of America
National Labor Relations Board

Agreement for Consent Election

Pursuant to a Petition duly filed under Section 9 of the National Labor Relations Act as amended, and subject to the approval of the Regional Director for the National Labor Relations Board (herein called the Regional Director), the undersigned parties hereby waive a hearing and Agree as Follows:

1. Election—An election by secret ballot shall be held under the supervision of the said Regional Director, among the employees of the undersigned Employer in the unit defined below, at the indicated time and place, to determine whether or not such

(Testimony of Harry Whiteside.)

General Counsel's Exhibit No. 6—(Continued)

employees desire to be represented for the purpose of collective bargaining by (one of) the undersigned labor organization(s). Said election shall be held in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election, and provided further that rulings or determinations by the Regional Director in respect of any amendment of any certification resulting therefrom shall also be final.

2. Eligible Voters—The eligible voters shall be those employees included within the Unit described below, who were employed during the payroll period indicated below, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, but excluding any employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election and any employees on strike who are not entitled to reinstatement. At a date fixed by the Regional Director, the Employer will furnish to the Regional Director an accurate list of all the eligible voters, together

(Testimony of Harry Whiteside.)

General Counsel's Exhibit No. 6—(Continued)

with a list of the employees, if any, specifically excluded from eligibility.

3. Notices of Election—The Regional Director shall prepare a Notice of Election and supply copies to the parties describing the manner and conduct of the election to be held and incorporating therein a sample ballot. The Employer, upon the request of and at a time designated by the Regional Director, will post such Notice of Election at conspicuous and usual posting places easily accessible to the eligible voters.

4. Observers—Each party hereto will be allowed to station an equal number of authorized observers, selected from among the nonsupervisory employees of the Employer, at the polling places during the election to assist in its conduct, to challenge the eligibility of voters, and to verify the tally.

5. Tally of Ballots—As soon after the election as feasible, the votes shall be counted and tabulated by the Regional Director, or his agent or agents. Upon the conclusion of the counting, the Regional Director shall furnish a Tally of Ballots to each of the parties. When appropriate, the Regional Director shall issue to the parties a certification of representatives or certificate of results of election, as may be indicated.

6. Objections, Challenges, Reports Thereon—Objections to the conduct of the election or conduct

(Testimony of Harry Whiteside.)

General Counsel's Exhibit No. 6—(Continued)

affecting the results of the election, or to a determination of representatives based on the results thereof, may be filed with the Regional Director within five days after issuance of the Tally of Ballots. Copies of such objections must be served upon the other parties at the time of filing with the Regional Director. The Regional Director shall investigate the matters contained in the objections and issue a report thereon. If objections are sustained, the Regional Director may in his report include an order voiding the results of the election and, in that event, shall be empowered to conduct a new election under the terms and provisions of this agreement at a date, time, and place to be determined by him. If the challenges are determinative of the results of the election, the Regional Director shall investigate the challenges and issue a report thereon. The method of investigation of objections and challenges, including the question whether a hearing should be held in connection therewith, shall be determined by the Regional Director, whose decision shall be final and binding.

7. Run-off Procedure—In the event more than one labor organization is signatory to this agreement, and in the event that no choice on the ballot in the election receives a majority of the valid ballots cast, the Regional Director shall proceed in accordance with the Board's Rules and Regulations.

8. Commerce—The Employer is engaged in com-

(Testimony of Harry Whiteside.)

General Counsel's Exhibit No. 6—(Continued)

merce within the meaning of Section 2(6)(7) of the National Labor Relations Act.

9. Wording on the Ballot—Where only one labor organization is signatory to this agreement, the name of the organization shall appear on the ballot and the choice shall be "Yes" or "No." In the event more than one labor organization is signatory to this agreement, the choices on the ballot will appear in the wording indicated below and in the order enumerated below, reading from left to right on the ballot:

First.
Second.
Third.
Fourth.

10. Payroll Period for Eligibility—Shop employees pay period ending 1-15-56. Parts men pay period ending 1-7-56.

11. Date, Hours, and Place of Election—Date: Tuesday, January 31, 1956. Hours: 12:00 noon to 12:30 p.m. Place: Employer's shop at Central Point, Oregon.

12. The Appropriate Collective Bargaining Unit —All employees employed at the Employer's Central Point, Oregon, plant to service, repair and maintain tractors and heavy machinery, including parts men and maintenance men but excluding su-

(Testimony of Harry Whiteside.)

General Counsel's Exhibit No. 6—(Continued)

pervisors, guards and professional employees as provided in the Act, and office clerical and technical employees and salesmen.

If Notice of Representation Hearing has been issued in this case, the approval of this agreement by the Regional Director shall constitute withdrawal of the Representation Hearing heretofore issued.

HOWARD-COOPER CORPORATION,
(Employer);

By /s/ J. P. STIRLING,
(Name and Title).

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO), AFL-CIO.
(Petitioner.)

Case No.: 36-RM-1165.

THOMAS P. GRAHAM, JR.,
Regional Director;

By ROBERT J. WIENER,
Officer in Charge, Regional Director, National Labor Relations Board.

Received in evidence June 25, 1956.

(Testimony of Harry Whiteside.)

Q. (By Mr. Boyd): With respect to this, Mr. Whiteside, I notice there is some slight variance between the description of the unit in the petition, as you filed it, and in the consent agreement that you indicated that you would agree to. This is not an issue in this matter, but it may have a slight bearing. Specifically, I notice that the consent agreement, as does the stipulated unit in the complaint, includes parts men. You agreed, did you not, with Mr. Hedges in telephone conversation that the parts men would be included in the unit? A. Yes.

Mr. Boyd: There is that specific provision that varies from the petition. [25]

Q. (By Mr. Boyd): You state that you received another document in the mail, being a copy of the petition of the employees, is that correct?

A. Yes.

Q. Was that one that you received an executed copy? Did it carry signatures on it?

A. I believe they were, either a carbon copy or a signature—I know it was in writing. It was not typed.

Q. Was any portion of it typed?

A. Just the clause, the paragraph up above, that was all.

Q. The text of the document was typed?

A. Right.

Q. But there were signatures——

A. Below.

Q. Apparently handwriting, and you had a carbon copy? A. Yes.

(Testimony of Harry Whiteside.)

Q. Is that correct? A. Yes.

Q. I hand you here document marked for identification General Counsel's Exhibit 7, which upon its face appears to be an original, an originally typed and signed document. May I ask whether you can identify that in relation to the document and in comparison with the document that you received in your office when you arrived there on January 18th? A. Yes; I received a copy of this. [26]

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 7 for identification.)

Q. (By Mr. Boyd): You got a copy of this?

A. Yes.

Mr. Boyd: I offer in evidence General Counsel's Exhibit No. 7.

Mr. Stirling: No objection.

Trial Examiner: Received.

(The document heretofore marked General Counsel's Exhibit No. 7 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 7

Central Point, Ore.

January 12, 1956.

National Labor Relations Board,
620 S.W. Main St.,
Portland 5, Oregon.

(Testimony of Harry Whiteside.)

Gentlemen:

The undersigned employees of Howard Cooper Corp., Central Point branch, respectfully petition that no action be taken regarding union organization and representation for this shop. Said employees have met with company officials and reached an agreement regarding working conditions and wages and do not desire to make a union affiliation at this time.

Copy to Harry Whiteside and Howard Cooper Corp.

/s/ DONALD R. SQUIRE,

/s/ TED C. McCOY,

/s/ RICHARD N. HACHENBERG,

/s/ CHARLES A. BROWN,

/s/ HOMER BILLUPS,

/s/ STAN LONG,

/s/ H. E. CURTIS,

/s/ ALAN M. BISHOP,

/s/ J. G. HENAGAR.

Received January 16, 1956.

Received in evidence June 25, 1956.

(Testimony of Harry Whiteside.)

Q. (By Mr. Boyd): Having examined your copy of that document, and having before you the consent election agreement, which had been transmitted to you by Mr. Hedges for your signature, what did you do with respect to either of these documents?

A. Well, I decided I'd better get some advice on what to do because things were becoming complicated. So, I did. I called my office in Oakland and, after relating to them the situation, they told me not to sign the petition for the consent election.

Q. The agreement for the consent election?

A. Yes.

Q. Then what more did you do?

A. I was instructed to make up my own mind and go ahead and do whatever I think was right. So, I did not sign it. I went back to the Board on the 23rd.

Q. That's the following Monday? [27]

A. Yes; it was the following Monday, and filed an unfair labor charge against the company.

Q. That was the charges in this case?

A. That is the charges now pending.

Mr. Boyd: Pass the witness—oh, one question, it's only one more.

Q. (By Mr. Boyd): Prior to your seeing the carbon copy of GC-7, the employees petition, on January 18th, had you known the text of that document? A. No.

Mr. Boyd: Very well. That's all.

(Testimony of Harry Whiteside.)

Cross-Examination

By Mr. Stirling:

Q. Mr. Whiteside, you say that you discussed this particular document with Bishop when you were down in Medford on January 12th, I take it, from your testimony? A. Yes.

Q. And you met with a number of the employees at that time, as well as Bishop?

A. On the 12th?

Q. Well, that's what I got from your direct testimony, that you were at the hotel on January 12th, and you met with Bishop and also some of the other men. Is that not correct?

A. No; I didn't—I think you'll find that was on the 17th.

Q. On the 17th, you met with all of them. Well, on the 12th, Bishop told you that they were preparing a petition, asking the [28] election to be called off, or something to that effect, is that right?

A. Words to that effect, yes.

Q. And you told him at that time to go ahead and sign the petition, and instructed him to tell the other men to sign the petition?

A. That's correct.

Q. Then on January 17th, you met with all of them in Medford again, did you not? A. Yes.

Q. And did you discuss this employees petition at that time? A. On the 17th?

Q. Yes. A. Nothing directly on it, no.

Q. Did you know that one had gone in at that

(Testimony of Harry Whiteside.)
time? A. On the 17th?

Q. Yes. A. Yes.

Q. Did you tell them at that time you had no objection to them sending in such a petition?

A. Yes; I think I did. I told the fellows I had no objection to that. I had no authority to stop them from doing such a thing.

Q. Did you advise them at that time that you had also sent this letter to the company, notifying the company that the union had no objection to an increase in wages going into effect? [29]

A. That's right. I believe also I mailed copies of that to most of our fellows.

Q. Of that letter?

A. Or they were given copies, one or the other.

Q. You mailed copies of that letter that you sent the company on—— A. The 14th.

Q. ——January—— A. 14th.

Q. Your letter of January 14th, General Counsel's Exhibit 5, you sent all the men copies of that?

A. I wouldn't say all of them. There were some I mailed out; some I gave out.

Q. At any one of your meetings with the men, Mr. Whiteside, did you discuss with them what wage demands the union would expect to make upon the company? A. Not a general increase, no.

Q. Well, did you talk with them about what wage rates would be sought for journeyman mechanics, for example, or journeyman machinists?

A. I recall there was some discussion along those lines, yes.

(Testimony of Harry Whiteside.)

Q. And do you know when you had a discussion along those lines?

A. That would be in all probability around the 16th of November. That was at the Woodworkers office. [30]

Q. At any time, did you go over with them a proposed contract for submission to the company, or the proposed terms or parts of terms of a contract to submit to the company?

A. No; because under our setup the union does not make the contract. The members in the plant does. That comes after the election.

Q. Well, then, what was this matter that you discussed with them in answer to my earlier question about wage rates, and so forth, terms?

A. I was—each fellow would ask me what their craft would call for. In most cases, I told them I wasn't too familiar with the area rates at the present time. It was just a general discussion about wages. We did discuss that there were inequities within the Howard-Cooper Company between California and the Oregon setup.

Q. You mean that there was a difference in the wages in California than in Medford?

A. The wages in the plants. They knew what some of the other fellows in the plants were getting, whereas I didn't.

Q. Oh, they knew? A. Yes.

Q. Well, at any one of these meetings that you had with the men, did you ever discuss specific wage rates?

(Testimony of Harry Whiteside.)

A. I don't recall any general wage discussion on that.

Q. Did you make an inquiry to determine what the Medford area [31] rates were?

A. Did I make a determination or a survey of some kind?

Q. Yes; or have it done?

A. No; I didn't have it at that time, but I was in communication with people who were going to. I might say this, that our research does that work for us out of Detroit. That's our main source. May I say something else?

Q. Yes.

A. The only discussion I had about money, I believe, at that time was about the financial status of the company, which I had a copy of their financial report.

Q. Well, Mr. Whiteside, isn't it true that at one time in meeting with these men you discussed possible wage rates, and you found that the wage rates that you had in mind were actually less than what they were receiving?

A. No. I can correct you on that one. The discussion that we had about wages were, when men left that plant, that they received the same amount of money on the road without travel time and lunch money as they did inside the plant, if that's what you're asking about. That's the biggest discussion we had if I recall.

Q. Well, you stated that, when you had this meeting on January 17th, that you noticed some-

(Testimony of Harry Whiteside.)

thing had changed? A. Yes.

Q. And I ask you if it's not possible that, after the men [32] found what you had in mind asking for them for wages, that they changed their minds?

Mr. Boyd: I would object. This is becoming incompetent as to his opinion of the particular thing that influenced the change of their minds. I think it gets into a subjective—his estimate of a subjective reaction.

Trial Examiner: Well, he testified that there was a changed attitude. I suppose that it's proper on cross-examination to explore what in his opinion accounted for the changed attitude since his testimony that there was a changed attitude came out of his opinion. So, keep it within his opinion.

Mr. Stirling: All right.

Q. (By Mr. Stirling): Did you get my question, Mr. Whiteside?

A. Would you repeat it again?

Mr. Stirling: Will you read it, please?

(Question read.)

The Witness: No. I have to explain it to you a little bit why. Number 1, I had taken a Dale Carnegie course on how to meet friends and influence people, and during that course I knew that the management approach to the people had changed some of them, and that determined most of my decision of making up my mind that there was a decided change, which I explained to the fellows there at the meeting, that it was a temporary deal within

(Testimony of Harry Whiteside.)

each corporation during the time the union was in the picture, but, when they leave, or would leave the situation, it [33] would revert back to the old scramble of dog eat dog, which was going on in the plant.

Q. (By Mr. Stirling): Did you regard this petition that the men submitted to you, one of the General Counsel's exhibit here, that——

Mr. Boyd: GC-7 is the employees petition.

Q. (By Mr. Stirling): The employees petition, yes, General Counsel's Exhibit 7, did you regard that as a withdrawal by those men of authority to you and your union?

A. No; because I knew that most of the people would sign it, and signed it, because the question was asked of me if it was okay to go ahead.

Q. Then why didn't you consent to the election?

A. Because immediately after that, the company instituted the coffee setup, plus they discussed about laundering the coveralls, which was the beginning of it, and then in the back of my mind, I felt that this had a legal background that had been drawn up by a lawyer. Personally, I thought it might be someone in Portland, but I made up my mind that, whoever drew that up, if he wasn't a lawyer, he was cheating the bar out of dues. [34]

* * *

FRANK S. PARKER

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Your name, please?

A. Frank S. Parker.

Q. And your employment?

A. I'm employed by the Howard-Cooper Corporation in the capacity of Vice President.

Q. And your place of residence?

A. Portland, Oregon.

Q. You're one of the managing officials, however, are you not? A. Yes.

Mr. Boyd: The witness is being called under Rule 43 (b). [37]

Q. (By Mr. Boyd): Mr. Parker, what is your relation to the field operations of the company?

A. The field operations?

Q. Yes; the branch operations of the company?

A. The branch operations of the company?

Q. Yes.

A. Well, I would say that my relationship with the branches is to the effect that I am the general manager.

Q. Now, you were in that capacity back in January of this year? A. That's correct.

Q. What branches does the company have?

A. In the States of Washington, California and Oregon.

(Testimony of Frank S. Parker.)

Q. And those in the State of Oregon are located where?

A. In the State of Oregon, of course, our home office is in Portland, Oregon. We have a branch in Albany, Oregon; Eugene, Oregon; Roseburg, Oregon; Coquille, Oregon; and Central Point.

Q. That's five branches, together with the home office?

A. Well, I think that—yes, a total of six.

Q. Now, the nature of the enterprise is that of being a dealer, distributor and service, providing services and repair of the equipment, heavy equipment? A. Right.

Q. Will you relate, please, when you first had knowledge of the company's receipt of the document in evidence as General Counsel's Exhibit No. 3, namely, the letter demanding—of the [38] union demanding recognition and that you meet to bargain with it?

A. I believe that we received a copy of this or heard about this on the Saturday following.

Q. The 4th of January? I make available to you a calendar.

Trial Examiner: I don't think his answer is clear as to when he received it. He said the Saturday following, and then you interpolated, and he didn't answer your interpolation.

Mr. Boyd: I'm at fault.

Q. (By Mr. Boyd): You say the Saturday following. Following what date, Mr. Parker?

A. Following January the 4th.

(Testimony of Frank S. Parker.)

Q. I make available to you a calendar for the month of January and would have you, if you will do so, fix a calendar date.

A. I would say the 7th of January.

Q. And how did you come to know of the contents of the letter? How did it come to your attention?

A. How did it come to my attention? I believe we received it by mail from Central Point on January the 7th.

Q. Well, did you—had you been advised by the Central Point branch by telephone in advance of that having been received?

A. I believe that our branch manager received this on Friday, the 6th, and he called Portland, Oregon, and told us that such an article had been received and that he was going to forward it in the mail. I believe we received it on Saturday, the [39] 7th.

Q. For clarity's sake hereafter, what was the name of your manager at that time?

A. H. R. Heaton.

Q. Is he presently your branch manager?

A. Yes, but he's incapacitated.

Q. And you currently have an acting branch manager? A. Yes.

Q. Will you state, please, who was the plant superintendent of the Central Point plant in January of 1956?

A. The shop foreman, is that what you mean?

Q. That may be the shop—is that what you call

(Testimony of Frank S. Parker.)

him? A. The shop foreman.

Q. The shop foreman, yes. Who was the shop foreman? A. Mr. Thrash. [40]

* * *

Q. Apart from Mr. Heaton and Mr. Thrash, who are the supervising officials of the local plant?

A. Well, at that time, Mr. Heaton, of course was the branch manager and Mr. Thrash was the shop foreman, and in the office, of course, I think there was a man named Mr. Mullen in the office.

Q. In what capacity? A. Office manager.

Q. Were there any assistant foremen in the shop?

A. Well, I couldn't answer that either because I don't know if there was or wasn't.

Mr. Stirling: Excuse me. Are you asking about 1951 now?

Mr. Boyd. I'm now talking about 1956, January, 1956.

Q. (By Mr. Boyd): You so understood my question? A. As '56, yes.

Q. I'm asking whether in January, '56, there were any assistant foremen?

A. Not that I know of, no.

Q. That would be within the discretion of whom, to determine whether there would be assistant foremen?

A. That would be the discretion of the Portland management, also Mr. Thrash. [44]

Q. I see. So, insofar as the operation of the

(Testimony of Frank S. Parker.)

shop and the selection of assistants in the Central Points shop, that would be something to be determined by Mr. Thrash after consultation with the plant in Portland, the management in Portland?

A. Yes. He would recommend a man, and, if we would be agreeable with him, we'd probably have him.

Trial Examiner: Is it material as to whether Mr. Heaton became incapacitated?

Mr. Boyd: It is not.

Trial Examiner: All right.

Mr. Boyd: Although I'm willing that the witness disclose it.

Q. (By Mr. Boyd): When did Mr. Heaton become ill?

A. I can't give you the exact date of that either, but it was approximately, I would say, 60 days ago.

Q. It's been since February?

A. Yes. He became ill just recently and was operated on for a brain tumor.

Q. Following the receipt from the Central Point office of General Counsel Exhibit No. 3, the letter of January 4th, what action did you take with respect to that letter?

A. I didn't take any action with respect to the letter. I told the President about the letter. He also knew about it, Mr. Cooper.

Q. And what action did he take then? [45]

A. Why, I believe he notified Mr. Stirling of the receipt.

Q. Was there any response made to the letter?

(Testimony of Frank S. Parker.)

A. By whom?

Q. By the company?

A. No; I don't believe so because we have Mr. Stirling as our attorney.

Q. That is to say, if any response was made, it would have been made by Mr. Stirling?

A. That's right.

Q. Now, when did you learn of the union having filed its petition, the document in evidence as GC-4?

A. Upon receipt of it in the mail.

Q. And when was that in relation to the filing made of the petition on January 10th?

A. The petition was mailed to our Central Point branch and Mr. H. R. Heaton in turn directed it to Portland on January—I don't believe I was in Portland at the time this was received. I was out at one of the branches.

Q. Did you hear of it being filed when being out at one of the branches?

A. I don't recall. I don't know if I knew until I returned to the office or not.

Q. Well, now, I'm wanting to aid you in reconstructing your recollection, Mr. Parker. Do you recall where you were on January 11th? [46]

A. January 11th, I was in Central Point, Oregon.

Q. That's right. Do you remember where you were on January 10th?

A. January 10th, I was in Klamath Falls.

Q. At Klamath Falls? A. Yes.

Q. When did you arrive at Central Point?

(Testimony of Frank S. Parker.)

A. I believe I arrived at Central Point on the evening of January 10th.

Q. Now, is it your clear recollection that you were in Klamath Falls——

A. On January 10th?

Q. ——on January 10th, before coming over here?

A. Well, if it wasn't the 10th, it was the 9th that I was in Klamath Falls.

Q. Well, at least, at the moment, it is your recollection that you were in Klamath Falls on the day of the 10th until you drove over here in the afternoon of that day? A. Yes.

Q. And you arrived here at Central Point or at Central Point, I should say, when on January 10th?

A. On January 10th, I believe we arrived in Central Point approximately at, I would say 6:00 o'clock.

Q. Was it before or after business hours?

A. I believe it was after business hours. I know we came [47] across the mountain, and we had a flat tire down here at Phoenix.

Q. Well, specifically, the reason I asked that, did you attend to some business on the evening of January 10th? Did you put in some phone calls? Did you talk to some business people in the Central Point and Medford area?

A. Yes; I probably did. I called—I believe I called Mr. Heaton and Mr. Thrash, and they came down to the motel.

(Testimony of Frank S. Parker.)

Q. Did you call any management representatives of any other plants, competitors?

A. In Medford?

Q. Either Medford or Central Point?

A. On the night of the 10th?

Q. On the evening of the 10th?

A. Well, I don't—if I did, I don't recall it.

Q. Very well.

A. I might have called somebody on the 11th, but I don't recall the 10th.

Q. Well, let us proceed. It is your recollection that you heard about this petition when you were where? A. When I was in Portland, Oregon.

Q. About this petition? A. Yes.

Q. When had you left Portland?

A. I had left Portland the morning of the 9th.

Q. That was Monday morning? [48]

A. Yes.

Q. The petition hadn't been filed, had it, on Monday? A. Pardon?

Q. The petition had not yet been filed Monday?

A. Well, evidently not because it's dated the 10th.

Q. Yes. Well, then, how did you hear about it before you left Portland?

A. Hear about the petition?

Mr. Stirling: He didn't say he did.

Q. (By Mr. Boyd): Well, my question of you a moment ago—perhaps you misunderstood me—was: Where were you when you first heard about the petition, the document you have in hand?

(Testimony of Frank S. Parker.)

A. In Portland, Oregon, as I recall it.

Q. You recall that you were in Portland when you first heard about the petition? A. Yes.

Q. Now, a moment ago you said that you believed you were at one of the branch plants when you first heard about it. Which is your present recollection now?

A. As far as the petition is concerned, I may have heard about it in a branch, and I may not have heard about it until I returned to Portland.

Q. Very well. What branch plants had you visited between January 9th and January 11th before arriving at Central Point plant? [49]

A. I believe Albany and Eugene, Oregon.

Q. Now, having mentioned Albany and Eugene, Oregon, does that refresh your recollection of whether having either gone to Klamath Falls, or does it refresh your recollection as to where you were when you first heard about the petition being filed?

A. I heard about—I didn't know anything about this petition until I either returned to Portland, or I had been in some other branch. It was not prior to my meeting here in Central Point.

Q. It was not? A. No; not in the petition.

Q. As a matter of fact, didn't you have a notification from Mr. Stirling, either directly or indirectly, on Tuesday, January 10th, that the union had filed a petition with the Labor Board?

A. I had?

Q. Yes. Were you not notified by Mr. Stirling?

(Testimony of Frank S. Parker.)

A. Directly from Mr. Stirling?

Q. I'm asking you. A. I don't believe so.

Q. Either directly or indirectly through your office?

A. Indirectly, I may have heard from him, yes.

Q. And was it on the 10th? That's my question.

A. Oh, you're talking about this petition?

Q. About the petition and the intention to arrange a hearing on the petition. [50]

Trial Examiner: This is the petition that was filed on the 10th?

Mr. Boyd: The petition was filed on the 10th.

Trial Examiner: Well, is it your recollection now that you heard about it on the same day it was filed, namely, the 10th?

The Witness: No.

Trial Examiner: From anybody?

The Witness: I don't believe so.

Mr. Boyd: We'll take his recollection as he testified to it.

Q. (By Mr. Boyd): In response to that petition, did not your Counsel, Mr. Stirling, in compliance with request from the Regional Office, send to the Regional Office a letter under date of January 12, which for identification is marked General Counsel's Exhibit 8, a copy of which I make available to you now for examination?

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 8 for identification.)

(Testimony of Frank S. Parker.)

Mr. Stirling: I'm not going to have any objection to this letter, but Mr. Parker doesn't know anything about it.

Q. (By Mr. Boyd): Did you know, Mr. Parker, that Mr. Stirling wrote such a letter to the Labor Board in response to the petition?

A. On what date? [51]

Q. It shows the date of January 12th.

A. I didn't know about the letter, no.

Q. In any event, the writing of this letter by Mr. Stirling at that time was with the authority of the company? A. Yes.

Q. Providing the information that is contained in the letter? A. Yes.

Q. Is that correct? A. Yes.

Mr. Boyd: Counsel, will you stipulate that this is your letter written on January 12, making response to request of the Subregional Office for information relating to the employees at the company's operation, and whether or not the company would enter into a consent election agreement?

Mr. Stirling: Yes, I will stipulate that. I would also say that Mr. Parker doesn't know anything about that letter.

Mr. Boyd: Very well. I offer in evidence General Counsel's Exhibit 8.

Trial Examiner: You have no objection, Mr. Stirling?

Mr. Stirling: No objection.

Trial Examiner: Received.

(Testimony of Frank S. Parker.)

(The document heretofore marked General Counsel's Exhibit No. 8 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 8

J. P. Stirling
Attorney at Law
3128 N. E. Broadway ATlantic 8-5391
Portland 12, Oregon

January 12, 1956.

Mr. Robert J. Wiener,
Officer in Charge,
National Labor Relations Board,
U. S. Court House (New),
Portland 5, Oregon.

Re: 36-RC-1165.

Dear Mr. Wiener:

The information that I have in answer to your letter of January 10, 1956, is as follows:

1. Gaylord L. Hallett,
Homer E. Billups,
Charles A. Brown,
Richard Hachenberg,
Stanley L. Long,
Donald R. Squire,
Leslie C. Findley,
Alan M. Bishop.

(Testimony of Frank S. Parker.)

Hubert Curtis,
John G. Hennagar,
Theodore C. McCoy,
J. E. Carroll.

2. (a) Howard Cooper Corporation.
   (b) Corporation.
   (c) Distributor and dealer in heavy equipment.
   (d) Entire corporation—$10,000,000.00.
       Central Point Branch—$700,000.00.
   (e) Entire corporation—75%.
       Central Point Branch—none.
   (f) Entire corporation State of Oregon business—$10,000,000.00; State of Washington business—$3,000,000.00.
       Central Point branch—$921,000.00.
   (g) None (Oregon branches sell within Oregon and the Seattle, Washington, branch sells within Washington).

The Company does not desire to enter into a conventional agreement for an election.

Very truly yours,

/s/ J. P. STIRLING.

JPS:ga

Received January 16, 1956.

Received in evidence June 25, 1956.

(Testimony of Frank S. Parker.)

Q. (By Mr. Boyd): While you have that before you, Mr. Parker, may I direct your attention to the listing of the names that [52] appear as Item 1? Are you sufficiently familiar with the personnel of the Central Point plant to be able to identify the nature of the work that those people engage in?

A. Oh, some I do, and probably some I do not.

Q. Well, specifically, are not the names of Gaylord Hallett and Leslie Findley, the first name in each column, the names of the two parts men?

A. Yes.

Q. Are not the remaining names in each column the names of persons who are or were mechanics and welders in the shop?

A. Well, as far as I know, they are, yes. I know some of these fellows personally. Some I do not.

Q. Well, now, I direct your attention to the name of J. E. Carroll, the last name in the second column. Do you personally know J. E. Carroll?

A. No, I do not.

Q. Do you know whether J. E. Carroll was working at that time?

A. No. I would have to look at the records to find out.

Q. Very well. Do you know whether the normal complement of shop employees was nine or ten?

A. Normal?

Q. The normal complement?

A. I'd say it was rather normal, yes.

Q. Well, which? Nine or ten?

A. Well, I don't think you could specify it that

(Testimony of Frank S. Parker.)

closely because [53] at times there might be half a dozen men, and other times there might be a dozen or 14.

Q. Very well. Was the statement contained in the last paragraph of the letter, that the company did not desire to enter into a consent election agreement, when written on the 12th of January, so far as you know, the company's disposition, decision, determination?

A. Well, that was the determination arrived after discussing it with Mr. Stirling by Mr. Cooper, I imagine.

Q. Very well. You did not personally participate in that discussion?

A. Regarding this letter?

Q. In determining there should not be a consent election? A. No, I did not.

Q. Where were you on January 12th?

A. January the 12th, I was here on January 11th, and January the 12th—I spent the evening of January the 11th in Coquille.

Q. You have a branch plant there?

A. Yes.

Q. Had you visited that plant on that day, January 11th? A. Yes.

Q. And then on the following day, January 12th, where were you?

A. From—of course, I was at Coquille probably in the morning. I can't give you the exact time. [54]

Q. Yes.

A. I was there on the morning of the 12th, and

(Testimony of Frank S. Parker.)

then we went on to Roseburg, Oregon, and I don't know if we stayed in Roseburg or went on to Eugene. I believe we drove on later to Eugene.

Q. Now, how frequently did you make these visits—did you personally make these visitations to the branch offices?

A. I would say over the past five years——

Q. I'm speaking of this trip. How frequently was your practice in this current year to make these visitations to these plants? A. In 1956?

Q. Yes.

A. I don't come around to the—I don't visit the branches as often as I used to because I have an assistant now.

Q. And who is the assistant?

A. Mr. Ralph Thomas.

Q. Was he with you at that time?

A. Yes.

Q. And what is his capacity with the company?

A. Sales manager.

Q. At that time? A. Yes.

Q. And his present capacity?

A. Sales manager.

Q. And he was accompanying you on this trip at that time? [55] A. Yes.

Q. Was there any other persons from your main office accompanying you at that time?

A. No.

Q. You were about to say how frequently you made visits to the branch plants in the winter of '56.

A. I was about to say that during the past five

(Testimony of Frank S. Parker.)
years that I have visited the branches on an average, I would say, of every 25 days, but Mr. Thomas has become my assistant, and part of that load has been taken off my shoulders.

Q. Now, do you have a branch plant in Klamath Falls? A. No.

Q. Is it your clear recollection now that you were in Klamath Falls on the 10th of January?

A. I believe it was the 10th of January, yes.

Q. Is it your clear recollection that you came from Klamath Falls to Central Point on January 10th? A. I believe that was the date.

Q. And when had you gone to Klamath Falls?

A. We had gone to Klamath Falls on Tuesday morning.

Q. From where? A. From Eugene.

Q. That was the morning and day of the 10th? You left Eugene the morning of the 10th?

A. Yes. [56]

Q. Recalling that you left Eugene the morning of the 10th, may I again inquire if that will refresh your recollection whether you learned of the filing of this petition on January 10th? A. No.

Q. Very well. After arriving at Central Point on the evening of January 10th, what did you do with respect to matters relating to the Central Point operation? A. In the evening?

Q. Let's take what you did that evening.

A. I called up Mr. Thrash and Mr. Heaton, and they came down and we talked over business conditions in a room at the Crater Inn Motel.

(Testimony of Frank S. Parker.)

Q. Did your discussion relate at all to your knowledge, or rather to the fact known to you that the union had made a demand to bargain with the company in respect to the working conditions of the employees?

A. I knew that they had made a demand, yes.

Q. My question was: Did your discussion with Mr. Heaton and Mr. Thrash relate to that?

A. Yes, sir.

Q. Did you complete your discussion of the matter at that time?

A. With Mr. Heaton and Mr. Thrash?

Q. Right.

A. Oh, no, I wouldn't say we completed it. [57]

Q. Did you resume the discussion at any later time?

A. I think we discussed it the following morning.

Q. As a result of the discussions, what determination was made of the action to take?

A. What determination was made of the action to take?

Q. Yes.

A. Of course, that would involve Mr. Stirling, as far as the action was concerned. After we talked over the troubles down there, I decided to talk with the men as a group.

Q. Did you discuss doing that with Mr. Stirling before talking to them?

A. I don't recall that I did.

Q. Did Mr. Thrash or Mr. Heaton make con-

(Testimony of Frank S. Parker.)

tact with Mr. Stirling before the discussion you had with the group? A. Not that I know of.

Q. The responsibility for doing that was, among you three, would have been yourself, rather than them? A. For talking to the men?

Q. For talking with Mr. Stirling?

A. Yes, that's right.

Q. I mean, your decision, not theirs?

A. I would say so, yes.

Q. And did you talk with the men as a group?

A. Yes, I did.

Q. Where and at what time? [58]

A. It was the morning of the 11th in Mr. Thrash's office.

Q. And that was in the plant? A. Yes.

Q. At Central Point? A. Yes.

Q. This was a work day, was it not?

A. That's correct.

Q. And you say at what time in the morning?

A. Oh, the exact time, I couldn't give you. I would say between the hours of 10 and 11.

Q. That's when you met with them, and how long did the meeting last?

A. I'd say half an hour.

Q. Will you relate to us, please, your best recollection of what you said to the employees? First, may I inquire: How were the employees assembled?

A. How were they assembled?

Q. Yes. You say this occurred in Mr. Thrash's office. A. Yes.

Q. That was not their work place? I mean they

(Testimony of Frank S. Parker.)

didn't work in the office? They worked out in the shop? A. That's right.

Q. How were they—by what means were they assembled?

A. Mr. Thrash told them that I would like to talk to them.

Q. Very well, and did all of the employees attend, so far as [59] you know?

A. As far as I know. There might have been some of them out in the field at the time. I don't recall that.

Q. Did either Mr. Hallett or Mr. Findley attend, either of the parts men?

A. No, I don't believe so.

Q. Do you recall whether J. E. Carroll attended?

A. No, I do not.

Q. Well, will you describe, please, what took place in the course of the meeting, and in as much detail as you recall?

A. Well, of course, I was questioned by Mr. Hedges, and I wrote a letter recalling the things that I said to the group, which I believe you probably have a copy of.

Q. Well, let us have your present recollection as a witness in this proceeding.

A. I told the boys that I understood there was some trouble and dissatisfaction at Central Point.

Q. Now, may I interrupt you to inquire: Did you explain how you came upon that knowledge?

A. No, I don't believe I explained that.

Q. Did you tell them when you came upon that knowledge? A. No, I didn't.

(Testimony of Frank S. Parker.)

Q. Did you tell them where you were when you came upon that knowledge?

A. No, I don't think so. [60]

Q. Proceed, please.

A. And I told them that I understood that they were—there was some dissatisfaction in the group that were at Central Point, and that I would like to talk to them, but, first, I would like to explain my position, that I wasn't there to make any anti-union talk for the very simple reason that a great many instances I thought that unions were a necessity to avoid exploitation of labor, and that I hadn't always been an executive and I had worked with my hands for a number of years, and had worked in a shop of a corporation at Portland, Oregon, as well as Mr. Ralph Thomas, that we had arisen to our present positions through our attitude and willingness to work, taking on more responsible positions as time went on.

I told them about the history of the company, that we had been established for 40 some years, that we had had very little labor trouble taking the company as a whole, and that the doors of the company were always wide open for anybody that had a so-called beef about working conditions.

Then when I got through with that, I asked them if they had any particular questions which they would like to ask me, and, as I stated in my letter, why, the boys in the group were rather reluctant to say a great deal because—they might have said more if I had talked to them individually, but I didn't

(Testimony of Frank S. Parker.)

want to do that because I didn't want them—I didn't want to be accused of coercion. So, I thought I'd talk in front of the group so [61] they could all hear what I had to say, and they could all hear what the other boys had to say, and what their questions were.

The subject of the coffee break came up and——

Q. Do you recall who brought that up?

A. No, I don't recall exactly who brought that up.

Q. And what was said with respect to that?

A. And they said that in some of the branches that the men had coffee breaks, and they wanted to know if that was true, that they had heard about it previously, and I said that was true that they did. They wanted to know why they didn't have the same privileges, and I said, "Well, I imagine some of you boys have probably drank coffee on the job at one time or another in the past, and, although it wasn't actually the practice, why, it was in reality being done anyway," and I could see no objection to it, and I told them, if they wanted to have a coffee break, they could discuss it with the branch manager, and whatever he decided was okay with me.

Q. Well, now, he was seated there at the time?

A. Yes, he was.

Q. Was the determination made then?

A. I don't think it was made right then, no.

Q. Go ahead.

A. The subject of coveralls came up.

(Testimony of Frank S. Parker.)

Q. What was the coverall problem? Will you explain that to the Trial Examiner? [62]

A. Well, the laundering and the furnishing of the coveralls for the men.

Q. That is, they used coveralls, and that's their work clothes? A. Yes, in the shop.

Q. And how frequently were they required to change?

A. I believe twice a week as a general practice.

Q. And with respect to those coveralls, were they providing their own coveralls, or was the company providing them?

A. They were providing their own.

Q. And were they laundering them, or was the company laundering them?

A. The company was.

Q. And what was the point that they made?

A. Well, they mentioned that in some areas in various states that they did furnish coveralls, and I said that that is true, and so far that we had not granted that, but we had previously discussed it when Mr. Cooper and I sat down to discuss the general operation of the business.

Q. You say you had or had not discussed it?

A. We have previously discussed the coveralls, yes, but we had never taken any action on it.

Q. Was mention made of what it was costing them to provide their own laundering and coveralls?

A. Yes, I believe it was. I believe it was 65 cents.

Q. A garment? [63]

(Testimony of Frank S. Parker.)

A. I don't know if it was a garment or a week. I don't remember right now.

Q. Go ahead. Incidentally, it was known to you, was it not, that they were rented coveralls, that they had a coverall service?

A. I knew that they had a coverall service. I didn't know how it was handled, whether it was rented, or if they bought them, or what. I didn't know about that.

I also discussed the matter of the 10-cent hourly increase across the board.

Q. Now, what was that? Enlarge on that, please.

A. Well, Mr. Cooper and I sit down in the first week of January and the first week in July and discuss salaries and wages, and at that time we decide what we would do throughout our various branches, and I told the boys that we had agreed to put in an increase of 10 cents hourly increase across the board in all of our Oregon branches, but there was some question as to whether it could be granted in Central Point due to the fact that they had decided or that the union would represent them. I didn't know if we could give them any 10 cent an hour increase or not, but, if it were legal and if we could, we would give them the 10 cent an hour increase, as in the rest of our branches in Oregon.

Q. Incidentally, did you give 10 cents an hour across the board at each of your other [64] branches? A. Yes.

Q. That exact amount?

A. Well, I would say basically, yes.

(Testimony of Frank S. Parker.)

Q. Well, was there at any other branch in Oregon—and I'm speaking of branches, not the Portland one—was there any other branch given a 10 cents an hour increase? A. Yes.

Q. At what branches?

A. Oh, I would say all the branches.

Q. You're including, in saying that, the increase granted at Roseburg? A. Yes.

Q. Coquille? A. Yes.

Q. Eugene? A. Yes.

Q. What explanation of this increase had you given to your employees in Eugene?

A. Well, we—it is our policy to be paying a competitive wage whatever locality we're in.

Q. Yes, but my question was: What explanation had you given on the preceding day, the day before that, to your Eugene employees about the increase?

A. I didn't notify the employees at Eugene at all, I don't think, about the wages. [65]

Q. What explanation did you give at Albany?

A. I didn't give any explanation at Albany.

Q. What explanation did you give at Coquille? That is, on the afternoon of the 11th, or the next day? A. To the branch manager.

Q. But to the employees? A. Pardon?

Q. But to the employees?

A. Not to the employees.

Q. Or at Roseburg on that next day?

A. The branch manager, I mentioned it to him.

Q. But not the employees? A. No.

Q. Very well. Proceed then. You say that you

(Testimony of Frank S. Parker.)

told them this concerning the intended wage increase, but you were uncertain as to whether you could do so, you said? A. At Central Point.

Q. At Central Point? A. Yes.

Q. It was only to these employees here that you made that explanation?

A. Yes. I didn't talk to any other employees at any place else.

Q. What else developed in the course of the meeting?

A. Well, basically, that's it. [66]

Q. Did they bring up any other grievances that you recall?

A. Yes, there was something about the health and accident policy.

Q. That is, the insurance benefits?

A. Yes.

Q. That are carried on the group policy?

A. Yes.

Q. Now, is that at your expense or their expense?

A. I can't tell you the exact proportion, but I believe they pay part of it, and the corporation pays part of it.

Q. Do you remember what point was made in relation to that?

A. Yes, I do. It was made in regard to maternity benefits.

Q. And what was the response? What was your response, or the response made to that suggestion?

A. Well, my response to that suggestion was

(Testimony of Frank S. Parker.)

that—well, you could get whatever you paid for. In other words, you could get in so many benefits into your insurance program that you could cover everything, but that the more you covered, the more it would cost, naturally, and on the maternity benefits, I said, "Well, maybe some of the boys here that are older than some of you younger fellows would object to paying for maternity benefits, because, after all, they were past their reproductive stage," and some of the boys agreed to that.

Q. What other points were brought up that you recall, Mr. Parker? [67]

A. About——

Q. That were grievances.

A. Grievances? Well, there was one fellow—I don't recall who it was now, whether it was Mr. Bishop or Mr. Billups, but I believe it was one or the other, and I could be wrong about that, but it was finally discussed and this one gentleman said he didn't have too much to kick about because he had received a great deal more in benefits than it had ever cost him.

Q. This is insurance benefits you're talking about? A. Yes.

Q. My question—my intended question was: What other matter was brought up as a grievance or beef at this meeting?

A. Oh, somebody brought up the fact that there was a higher wage rate paid in our Eureka branch.

Q. And was that discussed at the time?

A. Yes.

(Testimony of Frank S. Parker.)

Q. Tell me: Were the men—you said awhile ago that they seemed to be reluctant to speak—did they come forward with these things?

A. After awhile, yes.

Q. With these points? A. Yes.

Q. Readily, or was there an effort made to elicit from them what was their problem?

A. No. I just asked them if they had any questions. I was [68] through with my talk, and I asked them if they had any questions they would like to present to me.

Q. And this was their response to you?

A. Yes.

Q. Well, did either Mr. Thrash or Mr. Heaton or Mr. Thomas speak to them?

A. No. I think Mr. Thomas verified the fact that he had been with the company for a certain number of years, and that he had come out of the shop and was now the present sales manager.

Q. Did you—do you recall Mr. Thomas himself asking, "What is it that you don't like about the operations here in the shop?"?

A. No, I don't think so. I think I did. I think I'm the one that asked that.

Q. You think you're the only one?

A. Yes.

Q. You recall you were the only one that raised that question? A. Yes.

Q. Following—have you now recounted as fully as you can recall that which developed in the course

(Testimony of Frank S. Parker.)
of that meeting? A. Basically, yes.

Q. Was there any comment about or statement or question by you as to why they would go outside the shop?

A. Well, in my talk to them, I said—yes, I said that I understood that they had made representation or signed cards, or something, that that was their privilege to do so, but that [69] I didn't know why they would want somebody else to represent them when the doors of our office were always open to any grievances as far as the employees were concerned.

Q. Now, following that—that fully recounts your recollection of what transpired in that meeting? A. Basically, yes.

Q. Your recollection is that meeting ended about when?

A. About a half hour after it started. I can't tell you exactly when.

Q. In other words, it ran the course of a half hour? A. I would say so.

Q. After that, what did you do?

A. After that, I went into the office, and with Mr. Heaton and Mr. Thrash discussed general business procedures, and I believe that Mr. Townsend was there too because he had some questions to ask concerning the transaction he was on.

Q. What discussion did you have with respect to the meeting with the employees, or the occasion for your meeting with the employees?

(Testimony of Frank S. Parker.)

A. Oh, I don't recall that, what the subject was, what was discussed afterwards.

Q. Well, following your business meeting then with the other officials, what did you do?

A. As I recall, we went downtown and had lunch and, after lunch, I believe it was in my car—Mr. Thomas' car, after [70] lunch, why, we took off for Coquille.

Q. Before leaving for Coquille, did you discuss again with either Mr. Heaton or Mr. Thrash what further action might properly be taken with respect to this matter of union representation, or the employees grievances?

A. No, I don't think so. We drove up and they got out of the car, and we left. We had an appointment at Coquille that afternoon. So we had to leave.

Q. Was the wage increase instituted, and, if so, when?

A. The wage increase was instituted, I would say, on January 3rd.

Q. On January 3rd?

A. That's when we decided to give the 10 cent hourly increase.

Q. Well, do I understand that back on January 3rd you had begun to pay——

A. No.

Q. ——this increased rate?

A. No, we did not.

Q. When did you begin to pay at the increased rate the employees at the Central Point plant?

A. I believe it was January 9th.

(Testimony of Frank S. Parker.)

Q. Are you saying that that is when the rate—when the decision was made to put the rate in effect?

A. No.

Q. When was the decision made to put the rate in effect? [71] A. On January 3rd.

Q. Well, your plan to institute an increase was formulated on the 3rd? A. Yes.

Q. And as a result of that, you did institute the increase on the 9th? A. Yes.

Q. Well, then, what's the significance of your statement on the 11th that you weren't doing so?

A. That we were what?

Q. That you were not doing so, that you were not granting them the increase?

A. You mean as far as Central Point is concerned?

Q. Yes, that's my question.

A. I didn't make that statement, that we were not going to institute the increase. I said that we would give them the increase providing that we could and if it were legal.

Q. Well, when was the decision made that it was legal to do so?

A. After conference with Mr. Stirling.

Q. And when was that?

A. I couldn't tell you that.

Q. Did you participate in that conference?

A. No.

Q. Do you know whether that conference had been held before [72] you returned to Portland, or after ?

(Testimony of Frank S. Parker.)

A. I don't know the exact date. I believe it was held prior to my return to Portland.

Q. Mr. Parker, if it would refresh your recollection, I would produce the document marked for identification General Counsel's Exhibit No. 9, which I hand to you and direct your attention to the statement appearing at the top of the second page, it beginning at the bottom of the first page:

"He * * *" —referring to J. P. Sterling— " * * * informed us that we could so we went ahead and put it in effect there on or about January 12, 1956."

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

Q. (By Mr. Boyd): What is the significance of that date? A. Where are you reading now?

Q. I direct your attention down here. It starts with the word, "He * * *," he having reference to Mr. Stirling. A. Oh, I see.

Q. And reading this last sentence, across to the next page. The date that you supply in that affidavit, January 12th, has what significance then?

A. Well, I imagine was the interpretation of Mr. Stirling that it would be all right to go ahead with it, on that date.

Q. Do I understand from the affidavit then, when it was made, that you recalled that the determination to proceed and put the [73] increase in effect was made on January 12th?

A. Repeat that again.

(Testimony of Frank S. Parker.)

Q. There's nothing tricky to it. I'll have the Reporter read it to you.

(Question read.)

The Witness: Of course, I wasn't in Portland at that time, as you know, and this was a discussion with Mr. Cooper and Mr. Stirling.

Q. (By Mr. Boyd): This in your affidavit has reference to something that you learned from either Mr. Cooper or Mr. Stirling? A. Yes.

Q. And it was your best information then, from that discussion, which you had with one or the other of them, that they had decided that the increase should be put into effect on the 12th?

A. Well, I don't know if I had the information at that time. Of course, after my talk here, I talked to Portland and I told them about my talk to the boys down here. Then the details were handled out of Portland, and I was not there.

Q. Well, did you, following your discussion with the men in the plant on the 11th, call and talk with Mr. Cooper? A. Oh, yes.

Q. Mr. Frank Cooper? A. Yes.

Q. Did you tell him of your meeting with the men in the plant? A. Yes. [74]

Q. Did you discuss with him when the increase should be put into effect?

A. No. No, I didn't know if it would be.

Q. Did he call you back and tell you of his discussion with Mr. Stirling?

A. No, I don't believe so.

(Testimony of Frank S. Parker.)

Q. Well, when did you learn of the determination?

A. When I arrived in the office on Saturday morning.

Q. I see. Is it a fact to your best knowledge that the decision of the company to institute the—to put the pay increase into effect was arrived at on January 12th?

A. Well, as far as I know, it was arrived at at that time. I don't know if that was the exact date or not. Mr. Cooper talked to—I don't know if that's the date Mr. Cooper talked to Mr. Stirling.

Q. This is your affidavit, is it not?

A. Yes.

Q. General Counsel's 9? A. Yes.

Q. And the person before whom it was sworn, Joe Wallingford, is that an employee of your office?

A. Yes.

Mr. Boyd: I'll offer in evidence General Counsel's Exhibit 9.

Mr. Stirling: I have no objection. [75]

Trial Examiner: Received.

(The document heretofore marked General Counsel's Exhibit No. 9 for identification, was received in evidence.) [76]

(Testimony of Frank S. Parker.)

GENERAL COUNSEL'S EXHIBIT No. 9

United States of America
Before the National Labor Relations Board
Nineteenth Region

State of Oregon,
County of Multnomah—ss.

AFFIDAVIT

I, Frank S. Parker, a person of lawful age, being first duly sworn, make the following statement voluntarily and of my own free will:

I am the vice president of the Howard-Cooper Corporation which has its head office in Portland, Oregon.

On or about January 11, 1956, I learned that the United Auto Workers, AFL-CIO, had filed a petition for an election among the shop employees of our Central Point, Oregon, branch. I was already out in the field making the rounds of our branches and I proceeded on to Central Point, Oregon, where I talked to all the shop employees there who were present that day. I did not write out my speech nor make a recording of it. My best recollection of what I said to them at that time is contained in my letter of January 30, 1956, written to our attorney, J. P. Stirling, a copy of which has been furnished to the Board.

As I told the shop employees at that meeting it has been the practice of the Company to review

(Testimony of Frank S. Parker.)

our wage situation twice a year and to make raises at that time if they appear to be justified. Although I didn't explain it to the shop men at that meeting we depend on our branch managers to keep us informed as to what our competitors are paying in the area. Our branch managers in Coquille, Eugene, Roseberg and Albany had all written us that we were below the competitive rates in our area at their branches. As a result I had talked the matter over with Frank Cooper, the president of the Company, and we had decided the week before the Union filed the petition to grant a $.10 an hour raise to all our shop employees in all our Oregon branches. When we heard about the Union petition we didn't know whether we could go ahead and put the raise in effect in Central Point at that time or not. We went ahead and put it into effect in our other branches and consulted with our attorney, J. P. Stirling, to find out whether we could put it into effect in Central Point at that time without violating the law. He informed us that we could so we went ahead and put it in effect there on or about January 12, 1956. This was an across the board raise of $.10 an hour that we put in effect in all our shops in Oregon effective January 8, 1956.

We have a union contract in our shop in Seattle, Washington, and have had for some time but we don't have any contracts with any labor organization in any of our other shops.

(Testimony of Frank S. Parker.)

I didn't tell any employee or anyone else that the Company would close its Central Point establishment or its shop there if it went union nor did I make any statements of that sort. I heard that Hi Thrash, our shop foreman at Central Point, Oregon, had made some such statement. I called him about it and he admitted that he had discussed it with some of the men when they asked him about it. I told him not to make any such statements as he was just getting us into trouble with them.

I don't recall Foreman Thrash having said anything to me about talking to the men individually when I was there on or about January 11, 1956. If he did that I am sure that he never told me that he had.

I have read the above statement consisting of one typewritten page in addition to this and it is true and correct.

/s/ FRANK S. PARKER.

Subscribed and sworn to before me this 10th day of April, 1956, at Portland, Oregon.

[Seal] /s/ JEWELL WALLINGFORD,
Notary Public.

My commission expires Aug. 25, 1956.

Received April 11, 1956.

Received in evidence June 25, 1956.

(Testimony of Frank S. Parker.)

* * *

Redirect Examination

By Mr. Boyd:

Q. A more interesting question is: Why did you tell them that they were going to get when you didn't tell them at the other points?

A. Pardon?

Q. A more interesting question is: Why did you tell these that they would get it, when you didn't tell the other employees?

A. Well, I don't hold a group meeting at every plant that I go to. In other words, I carry on business relationships of the company primarily with the branch managers.

Q. And this was the exception, talking with these employees? A. That is correct. [85]

* * *

ALAN BISHOP

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Your name is Alan—A-l-a-n—Bishop?

A. Yes, sir.

Q. And you live where?

A. In Central Point.

Q. What is your present employment?

(Testimony of Alan Bishop.)

A. I'm the night policeman for the city of Central Point. [86]

Q. What was your employment in January of 1956?

A. I was a serviceman for Howard-Cooper Corporation.

Q. At the Central Point plant?

A. That's correct.

Q. Had you been similarly employed in November of 1955? A. Yes.

Q. In November, '55, was there any effort made to your knowledge to solicit the employees to authorize a union to represent them?

A. Yes, there was.

Q. And by whom?

A. Mr. Harry Whiteside.

Q. And do you recall when and by what means that was instituted?

A. Well, it was after work one night. When we all went out to get in the cars to go home, Mr. Whiteside was standing there and he passed out literature relating to the union, and social security benefits, and that sort of thing.

Q. Directing your attention to a document in evidence as General Counsel's Exhibit No. 2, I ask whether you have seen such a document as that before? A. Yes.

Q. When?

A. Well, this is the card that was attached to the envelope that he handed us.

Q. You mean that's identical in form to the one

(Testimony of Alan Bishop.)

that you [87] received? A. That's right.

Q. With respect to the card that you received, what did you do with it?

A. I filled it out, but, as far—I either personally delivered it to Mr. Whiteside, or it was mailed. I can't remember. I can't actually say which way it was.

Q. In what month did you fill it out and either mail or deliver it?

A. I believe it was in November.

Q. And was there any other activity in connection with organizing the workers in that month?

A. Well, we held a meeting in November.

Q. And do you recall the date of that meeting?

A. I believe around the middle of the month. I believe the 16th.

Q. The 16th of the month. The 16th of the month fell on Wednesday. Is that your recollection of the time of the meeting?

A. Well, as close as I remember, that is it.

Q. And where was the meeting held?

A. It was held in the Woodworkers hall in Medford.

Q. Do you recall how many employees of Howard-Cooper attended the meeting?

A. I believe there were seven of us there.

Q. And who, if you remember, gave notice that the meeting was [88] to be held?

A. Mr. Whiteside.

Q. And by what means did he notify the employees?

(Testimony of Alan Bishop.)

A. I believe he contacted me, and I contacted the men.

Q. At the plant, or——

A. I believe at their homes.

Q. Very well. Now, you say that you had filled out one of those cards, GC-2, and sent it in. I hand you here a typewritten duplicate of one of these cards with entries made on it and ask you to examine and state whether that document——

Mr. Boyd: I'll show you the one he has in hand.

Q. (By Mr. Boyd): My question is: Is this document as filled out by typewriting filled out to conform to the one that you filled out and delivered to the union in November? A. Yes.

Mr. Boyd: Just a moment. Before answering, I want to show this to Counsel.

Q. (By Mr. Boyd): Your answer to that question was what? A. Yes.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 10 for identification.)

Mr. Boyd: I'll offer in evidence General Counsel's Exhibit 10, which is a conformed copy, as testified by the witness, to that one which he submitted in November.

Trial Examiner: Objection? [89]

Mr. Stirling: Might I ask a question or two of the witness to clarify it?

Trial Examiner: Go ahead.

(Testimony of Alan Bishop.)

Mr. Stirling: Mr. Bishop, when did you first see this particular card?

The Witness: The first time I saw that was right here.

Mr. Stirling: Today?

The Witness: That typewritten one.

Mr. Stirling: And then you turned in your card, and did you fill it in in your own writing?

The Witness: Yes, sir.

Mr. Stirling: I believe I would have to object, Mr. Examiner, because it is not the original card that was signed by Mr. Bishop.

Mr. Boyd: I must concede that. I would explain to the Examiner and Counsel the problem that I have and I'm endeavoring to meet the problem by oral testimony, rather than by original documents, using the secondary evidence. Mr. Whiteside has disclosed that the original cards he has not yet found.

Mr. Stirling: I recall from Mr. Whiteside's testimony what the situation is.

Mr. Boyd: My point is this, if we stand on the best evidence rule and that alone, my alternative is to ask for continuance at the end of the case to take the further testimony of Mr. Whiteside by deposition when we have found the cards. All I [90] know is that he has been able to supply these from the information that he took off the originals.

Mr. Stirling: Well, I think your men, who are witnesses, of course, if they did sign a card, will testify that they signed a card.

(Testimony of Alan Bishop.)

Mr. Boyd: That's right.

Mr. Stirling: Which is better than the card itself probably.

Mr. Boyd: Well, except that——

Mr. Stirling: And Mr. Bishop has testified he did sign such a card.

Mr. Boyd: And he testified too that it contained the information contained on GC-10, the point being that some of the parts of it were left blank and parts of it filled in, and the mere signature on a card without a detail might then be questionable. I endeavored to develop what the detail is that was put by each of my witness on the card.

Trial Examiner: Well, I see a problem, Mr. Boyd, and I think I'll take the evidence on the cards although they are not the best evidence and the testimony on it and receive the cards with the understanding at the close of the hearing that, if Mr. Stirling wants to renew his objection, why, then I'll hear him and I'll hear you about taking a deposition.

(The document heretofore marked General Counsel's Exhibit No. 10 for identification, was received in evidence.) [91]

(Testimony of Alan Bishop.)

GENERAL COUNSEL'S EXHIBIT No. 10

Mail This Card Today

Authorization for Union Representation Under the Federal Labor Laws of the United States Government!

Do you want the UAW-CIO to bargain for you for a signed labor contract providing for wage increases, better vacation pay, job security, and other improved conditions of employment?

YES ☒ NO ☐

My Signature: Alan M. Bishop.

Phone 4-2054.

My Address: P.O. Box 772, 56 Bigham Lane.

City: Central Point.

I am employed by: Howard-Cooper Co.

How long? 3 yr.

Kind of work I do: Mechanic.

Present Wage Rate: $2.05

Drop this Filled-Out Card in the Mail Box Today!

All cards are kept confidential by the UAW-CIO and by the Federal Government.

Received in evidence June 25, 1956.

(Testimony of Alan Bishop.)

Mr. Boyd: That's reasonable enough. Do you understand?

Trial Examiner: Let's go ahead then on that basis, at least for the time being.

Mr. Boyd: Very well.

Q. (By Mr. Boyd): Now, at the time of this meeting, will you tell me more particularly——

Trial Examiner: May I interrupt?

Mr. Boyd: Yes.

Trial Examiner: I thought you just got through saying that some of the data on the card was filled in and some wasn't.

Mr. Boyd: That is indicated.

Trial Examiner: Well, have you asked this witness whether he filled in all the data, as represented by the typewritten data? Will you ask him that?

Mr. Boyd: I'll do that. I thought I had.

Trial Examiner: You may have, and it may have escaped me.

Q. (By Mr. Boyd): Directing your attention to the typewritten notations that appear on the card, can you state whether on the card, the original card, which you signed and turned in to the union, that you supplied the union the information on that card as shown on this copy?

Trial Examiner: And all that appears on that card?

Q. (By Mr. Boyd): And all?

A. Yes, this is—possibly the date might have been off of it, but this is the way I filled mine out. [92]

(Testimony of Alan Bishop.)

Q. Very well. Now, I want you to describe the arrangement that—the effort that you made in seeing that the other employees could get to the union meeting.

A. I contacted the men, and I was to pick up Dick Hachenberg and John Henagar and Homer Billups, Ted McCoy and Hubert Curtis, and to take them to the meeting. When I went over to Hachenberg's house, he said that he had to go to the National Guard meeting, so that he would be down later, and he gave me his card to turn in to Mr. Whiteside.

Q. He gave you his card to turn in to Mr. Whiteside? A. Yes.

Q. What did you do with his card?

A. I gave it to Mr. Whiteside.

Q. And where did you give it to Mr. Whiteside?

A. When we went into the meeting hall, at the Woodworkers hall here in Medford.

Q. And this was in November, this meeting in November? A. Yes, sir.

Q. Where is Mr. Hachenberg now, if you know?

A. He's presently with the National Guard at Fort Lewis on two weeks active duty.

Mr. Boyd: I would inform the Examiner and opposing Counsel that an effort to subpoena Mr. Hachenberg has been unsuccessful. He's in the hands of the United States Government on this maneuver. [93]

Q. (By Mr. Boyd): Mr. Bishop, I hand you a document marked General Counsel's Exhibit 11 for identification and ask you to examine it, ex-

(Testimony of Alan Bishop.)

amine it carefully, and state whether that is a true copy with the entries thereon shown of the card given to you by Mr. Hackenberg, which you in turn delivered to Mr. Whiteside?

A. Well, Dick's card was handwritten. The only difference is that this is typewritten.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 11 for identification.)

Q. (By Mr. Boyd): The entries are the same—— A. Yes.

Q. ——as on the original, so far as you recall?

A. As far as I recall, yes.

Mr. Boyd: I offer General Counsel's Exhibit No. 11 in evidence.

Mr. Stirling: I'll object for the same reasons and also for the additional reason that this card, of course, is not Mr. Bishop's card. It is Mr. Hachenberg's card that you're attempting to identify now.

Mr. Boyd: Yes.

Trial Examiner: Well, this is another step removed, of course, as you know, Mr. Boyd, one step removed.

Mr. Boyd: Yes, one step removed.

Trial Examiner: I doubt very much, since there has been [94] an objection, whether it is acceptable proof of this man's authorization to the union. I have doubts about it. I'm going to receive it in evidence, but at the same time I'm going to express doubts whether a value can be placed on it because

(Testimony of Alan Bishop.)

of it being another step removed.

Mr. Boyd: This the only one that's far removed because the other witnesses I have here. You will recall that the Witness Whiteside testified that he had received the seven cards and identified the names of the persons from whom he had received cards. This witness has explained the delivery of that card to him, and identifies this as being a true copy of the one he delivered.

Trial Examiner: Of course, Mr. Whiteside didn't testify that he saw this person sign a card.

Mr. Boyd: This witness alone is the one competent to say it was delivered to him by Hachenberg.

Q. (By Mr. Boyd): Do I understand that is your testimony, that Hachenberg gave you his card to be delivered to Mr. Whiteside? A. Yes.

Trial Examiner: Did you see him sign it?

The Witness: No, sir, I can't say that I saw him sign it.

Trial Examiner: Well, with the reservations I've expressed in order to keep this thing moving, I'll receive it on that tentative basis. I don't think I could rely on it if it became a point in the conclusion. [95]

(The document heretofore marked General Counsel's Exhibit No. 11 for identification, was received in evidence.)

(Testimony of Alan Bishop.)

GENERAL COUNSEL'S EXHIBIT No. 11

Mail This Card Today

Authorization for Union Representation Under the Federal Labor Laws of the United States Government!

Do you want the UAW-CIO to bargain for you for a signed labor contract providing for wage increases, better vacation pay, job security, and other improved conditions of employment?

Yes ☒ NO ☐

My Signature: Richard N. Hachenberg.
My Address: Box 746.
City: Central Point.

I am employed by Howard-Cooper Co.
How long? 9 mo.
Kind of work I do: Mechanic.
Present Wage Rate: $2.00.

Drop this Filled-Out Card in the Mail Box Today!

All cards are kept confidential by the UAW-CIO and by the Federal Government.

Received in evidence June 25, 1956.

Mr. Boyd: Very well. I understand though that the Trial Examiner, with the reservations that he has made in his comment, is receiving GC-11 in evidence.

(Testimony of Alan Bishop.)

Trial Examiner: Correct.

Q. (By Mr. Boyd): Now, Mr. Bishop, you say seven people attended that meeting. Will you identify the ones who were there?

A. There was myself, Hubert Curtis, Homer Billups, Stan Long; Ted McCoy came in late. Dick Hachenberg came in late——

Q. That's the man whose card you referred to?

A. Yes, sir. After he got off the National Guard, he came in. I believe that's it.

Q. You have mentioned six. Specifically, was Charles Brown there?

A. Charles Brown was there.

Mr. Stirling: I object to that as leading.

Mr. Boyd: It is leading. I'll prove it through Charles Brown. He's here.

The Witness: Well, I just couldn't recall his name.

Q. (By Mr. Boyd): Now, what took place at the meeting?

A. Well, we walked in the door. I put the cards on the desk and turned and introduced the men that didn't know Harry Whiteside.

Q. Who was the man right behind you? Well, that's immaterial. [96] A. I don't recall.

Q. Very well. What I meant was: What was decided at the meeting?

A. Well, we talked about the union, and we decided that we wouldn't do anything about it until after the first of the year. We thought we'd just be quiet, I guess, is the best way to say it. We

(Testimony of Alan Bishop.)

didn't want to do anything to notify the company that we wanted the union.

Q. Very well. Now, moving along to the first of the year, was there any—so far as you know, did you take any action toward dealing with the company from November until the first of the year?

A. No.

Q. All right. Directing your attention to the demand, which the union made upon the company in its letter of January 4, were you informed of the union making such a demand for recognition on that date, which is General Counsel's Exhibit 3?

A. I believe I knew about it.

Q. All right. Now, keeping that date in mind——

A. January the 4th.

Q. Well, you learned about it thereafter, I assume? A. Yes.

Q. Keeping in mind the date of January 4 and using the calendar to refresh your recollection, when was the first knowledge you had of the company knowing of the union's demand? [97]

A. Well, that would be the next week.

Q. And when in the next week?

A. The 11th.

Q. Will you tell us now what took place on the 11th?

A. Well, we all went to work and around 10 o'clock the shop foreman came out and told us that he wanted to talk to us in his office.

Q. That was who? A. Mr. Thrash.

Q. That's the gentleman seated over here?

(Testimony of Alan Bishop.)

A. Yes.

Q. Did you go into the office? A. Yes.

Q. What took place?

A. We all went in the office and sat down, and Mr. Parker and Mr. Thomas and Mr. Heaton and Mr. Thrash came in.

Q. Who among them did most of the talking, acted as the spokesman? A. Mr. Parker.

Q. Did others talk at all?

A. Oh, there was—they said something. Mr. Thomas said a few words.

Q. Well, will you relate now, as best you recall, how the meeting was opened, and by whom it was opened, and the words in which it was opened? [98]

A. Well, I believe Mr. Parker was introduced, and he started the meeting by saying that he and Mr. Thomas had been traveling south, visiting the different branches, plants, and, when they arrived in Eugene, he received a telephone call from Portland, informing him that there was labor trouble at Central Point, and that he——

Q. Is this his words? A. Yes, sir.

Q. All right, go ahead.

A. And that he called the Central Point branch, and they didn't know anything about it down there. So, they drove down to find out about it.

Q. Now, with that introduction, what did—what more did he say with that explanation? What more did he say?

A. He wanted to know what the trouble was.

(Testimony of Alan Bishop.)

Q. And what response did he get when he made that statement? A. Nobody said anything.

Q. What time did this meeting start?

A. Around 10 o'clock.

Q. And about what time was it completed?

A. About a quarter to 12:00.

Q. Now, will you relate as best you can the way that meeting developed from the point where he asked what the trouble was, and you said he got no response? Then what took place? Who spoke, and what was said? [99]

A. Well, he didn't get any response to the question, and there was a little pause, and then he said that he himself didn't have any objections to the union. In their proper place, he felt that they were all right, and that they tended to lead to hard feelings and strikes, people out of work, and neighbors not speaking to each other.

Then he voiced the query again. He wanted to know what the trouble was. He said the company's doors were always open to the men in the shop. If they had a beef, they could—they should feel free to come to the company, and that he didn't believe a third party was necessary in straightening out of matters.

Then I believe then is when the men started to voice what was on their minds, what little was said.

Q. Well, now, before you go to that, did any of the other men with Mr. Parker speak up?

A. I believe Mr. Thomas said, "Well, what is the trouble"? and nobody said anything. Then he

(Testimony of Alan Bishop.)

said, "Well, what is it you don't like"? and nobody said anything to that, and then he said, "What is it you do like"? Nobody said anything to that. He says, "Well, it looks like nobody likes anything." Then the question was raised—I don't know by whom, but it was one of those four gentlemen—"What is the trouble? Is Hy Thrash too tough on you"? Hy says, "Yeah, I'm really rough on them."

Q You said this? [100] A. No, Hy did.

Q. Oh, Hy said that?

A. In a joking manner. Well, it was kind of humorous. Everybody was a little nervous, I guess.

Q. All right. Now, what more was said?

A. I believe then the men raised a few questions.

Q. What were these points that were raised by the men, as you remember them, and by whom?

A. Well, I believe Ted McCoy raised the question of insurance. He felt that we paid too much money for the amount of coverage we had. At that time, his wife had just had a baby, and he felt that we ought to have insurance, I guess, to cover maternity benefits.

Q. And that was a point of discussion?

A. Yes. Mr. Parker told us that the company looked into all different kinds of insurance, and they had the best insurance that they could get for the amount of money that was being—that would be reasonable for us to pay. I believe that's about all that was said on insurance.

(Testimony of Alan Bishop.)

Q. All right. Now, what more—what other point was raised?

A. There was a question raised about coveralls.

Q. Do you remember who raised that?

A. No, I don't know who brought the question up.

Q. And what was the point raised about the coveralls?

A. Well, the person that raised it wanted to know why the [101] company didn't furnish coveralls, or share the cost of it.

Q. At that time, what type of coveralls arrangement did you have?

A. Well, there was a private laundry bringing coveralls once a week around the shop. Most of us had two clean pair a week.

Q. At whose expense? A. Our expense.

Q. How much did that cost?

A. Right after this meeting, the price went up. At that time, I believe we were paying 80 cents a pair per week. That would be $1.60 a week.

Q. All right. Now, what was the point made—what response did they make concerning the coveralls when this point was raised?

A. Well, Mr. Parker said that the company had never furnished coveralls, and I believe he asked Mr. Thrash if he would look into it as to getting them somewhere else at a little less cost.

Q. What other matter was brought up?

A. Well, I brought up the question of the differ-

(Testimony of Alan Bishop.)

ence between the pay rate at Eureka and the pay rate at Central Point.

Q. And what was the response to that?

A. Well, Mr. Parker told me the reason for the two different pay rates was that the cost of living and the cost of rent and everything in Eureka was higher than it was in Central Point.

Q. Was there any other further discussion about differences in [102] rates that you recall?

A. I believe there was some discussion about the difference between Central Point and Coquille, and I believe there was a few direct questions at Mr. Parker as to what was the rate in Portland, and possibly Redding, I believe.

Q. Do you recall what answer he gave?

A. I don't believe that he gave a direct answer. I believe he said he didn't know exactly what the rate was.

Q. All right. Now, was there any other point brought up?

A. No, I don't remember anything more.

Q. Do you have any recollection of a discussion about coffee breaks? A. Yes, there was.

Q. What was—Who brought that up, and what was said in response?

A. I don't know who brought the question up, but Mr. Parker said that he liked coffee, too, and that he felt a coffee break would be all right, and he turned to one of the other gentlemen—I forget which exactly that it was—but asked them to look

(Testimony of Alan Bishop.)

into it, as to getting equipment necessary to give us a coffee break.

Q. Do you recall any other matter being mentioned by him in the course of his speech, or by the employees in the course of his speech?

A. Not by the employees. [103]

Q. Do you remember him making any further remarks?

A. Well, he said that the company had a policy of every six months reviewing wage scales and the cost of living, and, if they were low, why, they would raise the scale, and that the company had just made one of those surveys and they felt that they were 10 cents an hour low, and that there was to be a 10-cent hourly wage raise, but he didn't know whether he could give it to us because of this union had petitioned for recognition, and he didn't know whether it would be legal or not.

Q. Did he specify whether he personally had inquired to find out how the rates paid you employees compared with the rates paid other employees in this area?

A. Yes, he did. He said when he arrived last night "* * * I phoned Mr. Bud Hopper in regards to his pay rates."

Q. Who is Bud Hopper, if you know?

A. I don't know the gentleman personally. I believe he's the owner of Hopper's Tractor & Equipment Company, and he's the Allis-Chalmers dealer at Medford.

Q. Very well.

(Testimony of Alan Bishop.)

A. And he called a gentleman at Caterpillar, which is Crater Lake Machinery Company, and that our rates was favorable with theirs. Now, I don't know what he meant by that.

Q. Do I understand—was he clear in saying whether the rates with the 10-cent increase would be favorable, or the rates without the 10-cent increase would be favorable? [104]

A. He told us that he contacted Mr. Hopper and this other gentleman the night before, and he said this before we even knew of the 10-cent——

Q. Before he made the announcement of the 10-cent increase? A. Yes.

Q. He mentioned this earlier?

A. Yes, he did. He mentioned this talking to Mr. Hopper and this other gentleman before—at the start of the meeting before.

Q. When the meeting first started?

A. Yes.

Q. And it was in the latter part of the meeting then that he announced that there was to be a 10-cent rate increase?

A. He asked what the trouble was and, after a long pause, why, I believe he used that to fill in the gap.

Q. It was after he got no response that he then came forward with the information that they were considering instituting a 10-cent increase?

A. That's correct.

Q. Is that correct? A. Yes, sir.

Q. Have you recounted as fully as you now re-

(Testimony of Alan Bishop.)

call that which developed in the course of that meeting? A. I believe I have.

Q. Well, now, passing the meeting, did anything more transpire [105] that day that you have personal knowledge of that related to the meeting or to the fact of the matter of the union representation of the employees?

A. No, not as far as I know.

Q. Did there on the following day—I'm referring now to January 12th?

A. Yes. When I came to work—that was Thursday morning—the shop foreman took me into the office.

Q. Your normal time of coming to work was when? A. 8 o'clock.

Q. And what time was it after you got to the office, or got to the plant that he took you to the office?

A. Well, it was shortly thereafter, maybe 8:10 or 8:15.

Q. Had you started to work before he called you into the office?

A. I believe I put my coveralls on. I don't believe I had started any jobs.

Q. Very well. Now, what took place—when you said shop foreman, you're referring to Mr. Thrash?

A. Yes. He said that they felt they didn't get anything logical the day before, and that they talked it over and that they felt that we men were —if we were interviewed separately, that we might feel freer to talk. He asked me if I had anything

(Testimony of Alan Bishop.)

that I felt I should say, and I said that I didn't feel that the scale was right, and he told me that it was up to his discretion [106] as to who got top money. By that, he meant the highest rate of pay, and that, if he thought a man was worth more, then he requested that he get more money.

Then I said I didn't feel that the overtime was distributed evenly enough, and he replied that——

Q. Was there much overtime in relation to the type of work that you were doing?

A. Oh, there's Saturdays, a few hours every day generally. Some weeks you were working Sundays, but very seldom.

Q. At that time, what rate per day were you being paid for overtime? A. Time and a half.

Q. And was the overtime work normally accomplished in the shop?

A. Well, very little of it is. It's generally the men that work in the field.

Q. Was it a part of your job as a service mechanic to work both in the shop and in the field?

A. Well, if there was no outside work to do, we naturally worked in the shop.

Q. Are you saying that normally your work was accomplished in the field?

A. Yes. If there was a job to do, then he would just send one of us out on it.

Q. To the customer's place where you would make the repair?

A. Yes. Wherever his equipment was, that's where we did the [107] job.

(Testimony of Alan Bishop.)

Q. Well, coming back now to your remark that there was not an even distribution of overtime or equitable distribution of overtime, what response, if any, did Mr. Thrash make to that?

A. Well, he told me that he'd asked me to work overtime quite a few times and I turned him down, and that he finally reached the point where he wouldn't ask me any more. He'd go get somebody else, and then he made the remark that I knew as well as he did that he had enough on me in the last six months to have canned me three or four times. By that, I took it that he meant customer complaints, that people were sore at me for something that I had done on the job out in the field.

Q. Had you had any customer complaints?

A. I had.

Q. How long before?

A. Well, the one that was called to my attention happened, I believe, a year before I left, maybe six months.

Q. Had you known of several of them in the six months preceding?

A. The only one that had been called to my attention was this specific one.

Q. If there were others, they were not called to your attention? A. That's right.

Q. Was there other conversation between you and Mr. Thrash? [108]

A. Well, he says "That's all there is." He sent me out on a job then, out in the field.

Q. That took you away from the plant?

(Testimony of Alan Bishop.)

A. That's correct.

Q. And you left the plant about what time that day? A. Probably 8:30 or 8:45.

Q. Did you return to the plant that day?

A. I did that afternoon about—around 5 o'clock.

Q. What was the normal quitting time?

A. 4:30.

Q. You say you arrived about 5:00?

A. Yes.

Q. Who was at the plant back in the shop when you arrived?

A. I believe Don Squire was there.

Q. Did you have any conversation with Squire when you came in?

A. He told me there was a paper up at the time clock and that to go read it, and, if I wanted to sign it, to sign it.

Q. Now, I direct your attention to the document in evidence as General Counsel's Exhibit Numbered 7 and ask whether you can identify that paper?

A. This is the paper.

Q. Is that the paper to which you have just referred in your testimony?

A. Yes, that's right.

Q. Will you state, please, to what extent that had been signed? [109] How many signatures were on that paper at the time you saw it at 5 o'clock —at or about 5 o'clock on the evening of the 12th of January? A. There was two signatures.

Q. And the signatures that were on there at the time were which two signatures?

(Testimony of Alan Bishop.)

A. Donald R. Squire's and Ted C. McCoy's.

Q. Those were the first two signatures?

A. That's correct.

Q. Did you at that time affix your signature?

A. No.

Q. Were there any other employees in the plant at that time, other than Squire?

A. There could have been. I didn't see them.

Q. I see. You say you did not sign it at that time? A. No, sir.

Q. What did you do?

A. I was a little nervous after I read it. So, I got in touch with Mr. Whiteside.

Q. And where did you—what effort did you make to reach Whiteside, and where did you get him? Without going into too much detail, when did you reach him?

A. I reached him that evening. I believe it was here in Medford.

Q. Did you know, when you started out to locate him, that he [110] was here in Medford?

A. No, sir, I didn't.

Q. But you did get him in Medford?

A. Yes, sir.

Q. Did you reach him—did you talk with him in person or by telephone, or both?

A. I believe I met him in the Jackson Hotel.

Q. Very well. Did you go alone to meet him?

A. Yes.

Q. Would you relate now what took place between yourself and Mr. Whiteside?

(Testimony of Alan Bishop.)

A. Well, I described this document as best I could and asked him what we should do.

Q. What you fellows should do?

A. Yes. I was a little apprehensive after reading it.

Q. Now, you hadn't known of what transpired during the day of the 12th with regard to this paper? A. No, sir.

Q. You just saw the paper, and then, seeing it, went and talked to Mr. Whiteside?

A. That's right.

Q. Now, when you talked with Whiteside and said to him what you should do, what did he say?

A. Well, he says "It's obvious that they're trying to find out who signed the cards." [111]

Mr. Boyd: We don't submit that statement to prove the truth of it. We're only accounting for the action of the witness.

Q. (By Mr. Boyd): Proceed.

A. He says, "To protect you men," he says, "tell them to go ahead and sign it."

Q. All right. What did you do after he gave you that instruction? A. I went home.

Q. When did you return to work?

A. 8 o'clock the next morning.

Q. At 8 o'clock the next morning, what took place?

A. Well, in walking from the main entrance to the shop, to the cloak room, where we left our lunch pails and coveralls, I met Dick Hachenberg about

(Testimony of Alan Bishop.)
half way across the floor, and he questioned me about it, and I said "Well, Mr. Whiteside says to go ahead and sign it to protect ourselves."

Q. And that was the extent of your conversation with Hachenberg? A. That's correct.

Q. I see that the next name in sequence is that of Hachenberg. It appears to be that of Hachenberg. Did you see him sign it? A. No, sir.

Q. You did not see him sign it?

A. No, I went on into the cloak room and put my lunch pail [112] down and put my coveralls on.

Q. Now, following his name or other names, did you see any of these other people sign, other than yourself? A. I don't recall.

Q. Your name is next to the last? A. Yes.

Q. About what time on the morning of Friday, January 13th, was it that you signed that document?

A. I know it was before noon. I don't know exactly what time.

Q. It was in the course of the morning?

A. Yes, sir.

Q. How long had you worked in the plant?

A. I'd been at Central Point about two years.

Q. Did you know a J. E. Carroll? A. Yes.

Q. Was J. E. Carroll working in the month of January of 1956 for the company?

A. No, sir.

Q. Has he worked for the company at any time in 1956 prior to your termination?

A. No, sir.

(Testimony of Alan Bishop.)

Q. You terminated with the company at about what date?

A. It must have been in March or April, possibly April.

Q. You say that you knew Carroll?

A. Yes, I knew him. [113]

Q. Had Carroll at any time worked for the company? A. He had in 1955.

Q. What was his capacity?

A. He was a welder.

Q. Who did the welding after Carroll ceased doing the welding? A. Curtis did.

Q. Do you know the circumstance of Carroll not continuing at the company?

A. Well, Carroll got sick. He had a heart attack, I believe.

Q. He had a heart attack, and it was following that that Curtis did the welding? A. Yes.

Q. Had Curtis been employed before Carroll had the heart attack?

A. No. He took Carroll's place.

Q. He took Carroll's place? A. Yes.

Q. Directing your attention to the list of names that appear on General Counsel's Exhibit Numbered 7, the company's letter——

Mr. Stirling: If you please, in order to save time in going into this matter of Mr. Carroll on the company's letter, I received a list of employees from the branch and submitted that list to the NLRB. That's the list that has been submitted in evidence. Now, I have—I don't know whether it

(Testimony of Alan Bishop.)

was at that time or later, but I understood that Mr. Carroll was being [114] carried as an employee of the company, but that he was not working because he was disabled, that he had had a heart attack or something some time prior to January of '56, but the company still considered him to be an employee. They were still carrying him on their records.

Now, I understand that he has since definitely been released and has severed his connection entirely with Howard-Cooper Corporation.

Mr. Boyd: When was that done, Counsel?

Mr. Stirling: I believe a couple months ago, probably in March. Now, it's my understanding that, when you submit a list of names to the NLRB for an election, that you include the employees who are temporarily absent, and Mr. Carroll is in that category. That's the reason, and I don't know whether it's necessary to go into anything further in regard to it.

Mr. Boyd: Except that his temporary absence has now become permanent, is that it?

Mr. Stirling: Yes, it has.

Mr. Boyd: One further thing, Mr. Stirling, since we were discussing the matter, it is stipulated, is it not, that Hallett and Findley were the two parts men?

Mr. Stirling: Yes.

Mr. Boyd: And that all remaining persons held classifications in the shop?

Mr. Stirling: Yes, I think that's correct, yes. [115]

(Testimony of Alan Bishop.)

Mr. Boyd: Maybe we can save a further step. Would you stipulate further that Hubert Curtis was employed to replace or took the place of Carroll when Carroll was disabled?

Mr. Stirling: No, I can't stipulate that because I don't know that.

Mr. Boyd: Well, we'll find that out.

Q. (By Mr. Boyd): One thing more: When were you informed and by what means were you informed thereafter of a pay raise?

A. I noticed it on the check.

Q. That was the first information that you had that a raise had gone into effect?

A. That's correct.

Q. Is that correct? A. Yes.

Q. You got that on the check which you received on what date?

A. That would be on the 20th, the check I got Friday, the 20th, had the——

Q. It was for what work week?

A. The work week of the 9th to the 15th.

Q. And the amount that you got then was the 10 cents increase over your previous existing rate?

A. That's correct. [116]

* * *

STANLEY L. LONG

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Will you state your name, please?

A. Stanley L. Long.

Q. And where do you live?

A. 602 North Riverside, Medford.

Q. Where are you employed?

Trial Examiner: Just a moment. Mr. Long, could you speak up a little better? I have some difficulty in understanding.

The Witness: 602 North Riverside, Medford.

Trial Examiner: That's fine.

Q. (By Mr. Boyd): And where are you employed?

A. At Howard-Cooper Corporation, Central Point.

Q. In what classification?

A. As a mechanic.

Q. When were you employed by them?

A. November the 14th, 1955.

Q. Mr. Long, I hand you a document marked for identification [118] General Counsel's Exhibit 12, which I ask you to examine carefully and state whether you can identify the form of that document? A. Yes, I can.

(Testimony of Stanley L. Long.)

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 12 for identification.)

Q. (By Mr. Boyd): In form, what is it as you identify it? A. What do you mean?

Q. Well, when did you first see such a document as that?

A. Oh, I received one of these at the meeting.

Q. At the union meeting?

A. At the union meeting.

Q. And when was that union meeting in relation to the time when you started to work?

A. Well, I believe it was around three days after I started to work, three or four days, something like that. I'm not sure on dates.

Q. With regard to the one that you received, what did you do with it?

A. Well, I looked it over and read it, and then I signed it.

Q. And having signed the one that you then had, what did you do with it?

A. I handed it to Harry Whiteside.

Q. Now, looking at this document marked for identification GC-12, will you examine the entries that are made on it and [119] state whether you had made identical entries to that in your own handwriting on the card that you turned in to Whiteside?

A. I did all except for one, the period of how long. I don't believe I filled that in.

(Testimony of Stanley L. Long.)

Q. You don't remember filling that in?

A. I don't remember filling that in, the period of time, because I had just gone to work there.

Q. Excluding the entry there, two weeks——

A. Yes.

Q. ——the rest of the card is filled in as you remember filling in your own card?

A. Yes, it is.

Mr. Boyd: In view of the witness' testimony and with that limitation on it, I offer in evidence GC-12.

Trial Examiner: Mr. Stirling, if you like, you can have a standing objection to all of these typewritten cards. I'm not suggesting you make it, but you objected to the previous ones, and I thought it might save time, if you want it.

Mr. Stirling: All right, that would be fine.

Trial Examiner: All right. There will be Respondent's objection to the typewritten cards in lieu of the originals, and I am receiving the typewritten cards on the basis of the testimony, and I've already commented on my action in doing so.

(The document heretofore marked General Counsel's Exhibit No. 12 for identification, was received in evidence.) [120]

(Testimony of Stanley L. Long.)

GENERAL COUNSEL'S EXHIBIT No. 12

Mail This Card Today

Authorization for Union Representation Under the Federal Labor Laws of the United States Government!

Do you want the UAW-CIO to bargain for you for a signed labor contract providing for wage increases, better vacation pay, job security, and other improved conditions of employment?

YES ☒ NO ☐ Date........

My Signature: Stanley L. Long. Phone........

My Address: 602 Riverside.

City: Medford. Zone No. ....

I am employed by: Howard-Cooper Co.

How long: 2 weeks.

Kind of work I do: Diesel Mech.

Present Wage Rate: $1.85.

I am on: Day ☐ Swing ☐ Graveyard ☐ Shift.

Drop This Filled-Out Card in the Mail Box Today!

All cards are kept confidential by the UAW-CIO and by the Federal Government.

Received in evidence June 25, 1956.

(Testimony of Stanley L. Long.)

Q. (By Mr. Boyd): Now, Mr. Long, what was determined at that union meeting?

A. Well, as far as I can remember, we just kind of discussed what the unions have done for other outfits in different areas, and more or less decided that we did want the union to negotiate for us, that we didn't want anything done though until after the first of the year, and that's as far as I can remember of what happened.

Q. All right. Let's move to the first of the year. In your recollection, were you working at the plant on January 11th? A. Yes, I was.

Q. Will you describe your recollection of what developed that morning?

A. Well, I don't remember the exact time, some time in the morning, I was starting to get some parts at the parts window, and this foreman, Hy Thrash, came by and told me to come into the office there.

Trial Examiner: Who told you that?

The Witness: The foreman, Hy Thrash.

Q. (By Mr. Boyd): Told you to go into the office. Keep your voice up. Did you go in?

A. Yes, I did.

Q. What took place in there?

A. Well, everybody else had gathered there, and Mr. Parker and the branch manager and Mr. Heaton and Hy Thrash, and then one [121] other gentleman with Mr. Parker, but I don't remember his name. It was Thompson or Thomas. I don't recall.

(Testimony of Stanley L. Long.)

Q. You remember there was a fourth man?

A. Yes, there was.

Q. Well, what took place, and will you describe as best you can the development of what took place?

A. As far as I can remember, Mr. Parker was either introduced or introduced himself—I don't recall—and he went on, after he was introduced, to state that he had—or he asked what the labor trouble was, what the trouble was in the shop, and he stated that he had received a telephone call at one of the branches, either Albany or Eugene—I couldn't remember just exactly what branch he stated—and that after he received the call, he called to Central Point to find out what they knew about it, and they didn't seem to know anything. So, he came down to Central Point to find out for himself what the trouble was, and he tried to—or he asked us to come out and state what the troubles were. I don't recall just how it was said or the words that he said then, but there wasn't much response from anybody. Everybody more or less stood around, and I recall him making one statement to the effect of the increase in wages. I don't remember just what he said in the morning there, but he did state, as far as I can remember, that we—they were considering a 10 cent increase in wages, but due to this trouble now they didn't quite see where they could give it to us. Now, that's as close [122] as I can remember of all that was said. I don't know the exact words.

Q. As to not getting the 10 cents?

(Testimony of Stanley L. Long.)

A. About the increase.

Q. What other points were made that you remember? A. Well, the point that——

Mr. Stirling: Excuse me. Would it be possible to state that Mr. Long would testify that the meeting resulted in substantially the same discussion as was testified to by Mr. Bishop?

Mr. Boyd: Discussions and proposals as testified to by Mr. Bishop. I would state that and am willing to stipulate that, Mr. Stirling, reserving though the privilege of developing two or three specific points then that would not be repetitious of the extended testimony. Is that agreeable?

Mr. Stirling: Yes.

Q. (By Mr. Boyd): Now, then, instead of going into all the points that Mr. Bishop covered in his testimony, you heard his testimony, didn't you?

A. Yes, I did.

Q. And as to the specific suggestions or beefs or grievances that were mentioned, you would testify substantially the same? A. Yes, I would.

Q. Specifically though with reference——

Trial Examiner: Will you give the witness a little more time? He seems to be pondering [123] there.

Mr. Boyd: Yes.

Q. (By Mr. Boyd): Was there any reservation or exception in your mind?

A. Well, I was just trying to recall if there was anything that I can remember that he didn't mention.

(Testimony of Stanley L. Long.)

Q. Well, may I direct your attention to one item? Do you remember any mention made by Mr. Parker of what he said was his attitude toward unions? A. Yes, I do.

Q. What was it he said as you recall?

A. As I recall, Mr. Parker said he had nothing against any union, but, oh, all they ever did, was they created, oh, hard feelings towards the men involved, and it created things like guys standing outside the house ready to beat up on the families or yourself.

Q. You recall him making mention of something in substance like that? A. Yes, I do.

Q. What other point?

A. And broken windows, and something pertaining to a soup line. I can't quite recall what brought that in or how it was said, but that's about as much as I can recall at the present.

Q. Do you have any recollection of him mentioning any investigation that he had made to find out wage rates in the Central Point area? [124]

A. Yes. He mentioned that, after he arrived there, that he'd called the different branches in the same line of work that we were doing there, the Hooper Tractor Company and Caterpillar Tractor Company, to find out if there was any difference in our wages and benefits, and that, as far as—well, what he received was the fact that they were pretty similar.

Q. That was his statement to you?

(Testimony of Stanley L. Long.)

A. Yes. That was—well, not the exact statement, but it was to that effect.

Q. As you recall, what was Mr. Parker's statement of what he had learned by reason of this inquiry?

A. Well, that—as far as I can remember, it was that we were getting paid about the same as the others, and I believe that we had more or less the same privileges as the other companies did in that area.

Q. When you said you believed that, you mean that you believe that yourself personally, or you believe that's what he said?

A. Well, that's the way I understood what—that's what I believed after he made that statement.

Q. That was the impression you got of what he said? A. Yes.

Q. How long did this meeting last, as you remember?

A. I don't recall the exact time or anything, but it was quite awhile. I know it took up quite a bit—the best part of the morning. [125]

Q. All right. Now, in the afternoon of that day, did anything more occur involving you in relation to the matter of the union representation? I'm talking of the afternoon of the date Mr. Parker was there.

A. I can't quite remember if there was anything in the afternoon or not.

Q. All right. We'll pass on to the next day then of your recollection on the following morning, the morning of the 12th. What took place?

(Testimony of Stanley L. Long.)

A. Well, as best as I can remember, it got rumoring around that, if petition was made by us and signed to the effect that we didn't want anything to do with the union, that we would receive a 10-cent wage increase.

Q. This was shop talk that you're talking about?

A. That was shop talk.

Q. Now, apart from that, did anything involve you personally?

A. No, nothing involved me.

Q. Were you called in by Mr. Thrash the following morning for a personal interview?

A. No, I wasn't.

Q. You were not? A. No.

Q. Was there any discussion that you participated in among the men working in the shop about the matter of preparing——

A. Yes. [126]

Q. ——a document? A. Yes, there was.

Q. When did this take place?

A. Well, if I remember, it was in the morning, some time in the morning.

Q. At that time, were you working alone, or was there someone working with you on the equipment you were working on?

A. Well, as close as I can remember, I was working on the same piece of equipment with that certain party.

Q. Well, now, what's his name? Let's be specific.

A. Charlie Brown.

(Testimony of Stanley L. Long.)

Q. Charlie Brown, and was your informant then about this matter Charlie Brown?

A. Yes, it was.

Q. Then what more developed in the course of the day, not in the way of conversation or talk, but what else happened?

A. Well, I can't remember for sure whether it was that day, but I believe it was, I believe around noontime that Mr. Thrash came out and told us that we would have a coffee break, a 10-minute coffee break, and not to misuse the privilege.

Q. You recall that as occurring——

A. I can't remember for sure if it was that day or the following, but I believe it was that day.

Q. Was the coffee break instituted in that same week that Parker was there? [127]

A. Yes, it was.

Q. And that's your recollection?

A. Yes, it was.

Q. All right. Apart from that, did anything more develop with regard to—I hand you here the document that's in evidence as General Counsel Exhibit No. 7 and ask whether anything more developed on the 12th of January with respect to that document, if you know?

A. Well, the only thing that I could remember is that Charlie Brown had mentioned to me that he was going to go ahead and type up that statement here because he was quitting and it wouldn't make any difference to him if anything ever come of it,

(Testimony of Stanley L. Long.)

that he would type it up for us if we wanted to sign it.

Q. When you say you—when he mentioned this to you, were you alone with him or was there a group of employees?

A. As far as I can remember, I was alone at the time.

Q. Did you see the statement on the 12th of January? A. No, I did not.

Q. You didn't see it on the 12th?

A. No, I didn't.

Q. Does that bear your signature?

A. Yes, it does.

Q. When did you put your signature on it?

A. I put mine on it Friday.

Q. That's the 13th? [128]

A. Friday, the 13th.

Q. And when during the course of the day on Friday, the 13th, did you do so?

A. Well, I don't recall the exact time or anything. It was about the same time as everybody else started to sign it. I just went over along with a bunch of the fellows and signed my name to it. The time of the day, I don't remember.

Q. At the time of signing it, were you informed of anything that Whiteside had said about signing that paper? A. Yes, I was.

Q. And by whom?

A. I was informed by Alan Bishop.

Q. Do you know—I don't want to ask you that. I'll get it through another witness.

Mr. Boyd: I'll pass this witness.

(Testimony of Stanley L. Long.)

Cross-Examination

By Mr. Stirling:

Q. Why did you sign that, Mr. Long?

A. Well, I was informed that, if I signed it, well, it would go ahead and help the other guys and myself get a 10-cent raise.

Q. Informed? You were informed?

A. Well, I was told.

Q. By whom?

A. By Alan Bishop, that he had received word from Mr. Whiteside that it was all right to sign it.

Q. Well, then, you signed it because Bishop told you that Mr. [129] Whiteside said it was all right to go ahead and sign it, is that it? A. Yes.

Q. You didn't sign it, in other words, because of any urging from any of your employers, Thrash or Mr. Parker, or anybody like that? Do you understand my question, Mr. Long?

A. No, I don't quite think I do.

Q. Well, your supervisor at Howard-Cooper is Mr. Thrash, is it not? A. Yes, it is.

Q. Did he have any conversation with you regarding you signing this paper?

A. No, he didn't.

Q. Why did you decide at that meeting in November to hold off having the union contact the company until after the first of the year?

A. Well, as far as I can remember, it was so it wouldn't foul up any of the guys' paid holidays

(Testimony of Stanley L. Long.)

and things because we were going to be losing some time there the last week in December, and everybody wanted to get as much as they could. That's as close as I can remember of all about what the deal was.

Q. What do you mean would be losing some time in December?

A. Well, a bunch of them—there would only be so many of us that would be allowed to work a couple days that one week to take inventory. [130]

Q. Oh, everything is shut down?

A. Everything is shut down, and, if anything developed, they figured maybe we wouldn't get paid for Christmas or for New Years. [131]

* * *

DONALD SQUIRE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Your name is Donald Squire?

A. That's right.

Q. And you live where?

A. 56½ Bigham Lane, Central Point.

Q. You're an employee of the Howard-Cooper Corporation? A. Yes.

Q. And have been for how long?

(Testimony of Donald Squire.)

A. The first time I worked for them was approximately five years ago.

Q. Now, were you at the plant on the morning—first, you did not sign a union card?

A. No, I did not.

Q. You did attend the meeting on the morning of January 11th when Mr. Parker spoke to you?

A. Yes.

Q. You heard the testimony of Mr. Bishop and Mr. Long concerning the contents of the meeting. Is their account of it substantially your recollection?

A. Yes, it seemed to be quite complete.

Q. Do you recall any additional or anything other than their [133] description?

A. No. Everything seemed to be quite true that's been brought up so far.

Q. Very well. With respect to the morning of the 12th, Thursday morning, I refer to now, Mr. Squire—— A. Yes.

Q. Were you personally interviewed by Mr. Thrash? A. No.

Q. But did you talk with him during the course of that morning? I do not mean a personal interview in his office, but did you talk with him in person?

A. Not as I recollect about anything important. Hy and I usually do confer quite frequently, just about general things in the shop.

Q. Well, he was around the shop that morning?

A. Yes.

(Testimony of Donald Squire.)

Q. You did have some conversations with him?

A. Just general.

Q. Well, did you talk specifically about—did he make any specific mention of how the employees might get their raise?

A. Yes. I don't believe it was that morning. I believe it was that afternoon that he and I just, like I say, in general conversation agreed that one way they could get the raise was if they were—if they didn't have any union representing them at that time, that they could file a petition or letter, whichever [134] may be used, and everybody sign it which was interested, which would cover a majority, and send a copy, I believe, to the Labor Relations Board, one to the company, and one to the union's representative.

Q. Now, how did that subject—how was that subject brought up? How did it happen to be mentioned?

A. I can't recollect exactly, but I think it was Mr. Thrash's interest that the fellows do get the raise when it had been brought up before this situation.

Q. This was your impression of what he was saying at that time?

A. Just the conversation between us.

Q. Now, do I understand it's your recollection that he said that the means would be by—if they submitted a letter of petition signed by them to the Labor Board?

(Testimony of Donald Squire.)

A. I can't remember him saying exact words like that.

Q. I'm not asking for his exact words. I want to know the substance of it as you recall.

A. I don't know whether it was his words or mine on that. He had not said outward or that there was anything suggested, but there was one possibility to handle it and it could go through.

Q. Did he at that time suggest to you the matter of imparting that information to the other employees?

A. I don't remember any statement to that effect.

Q. Do you remember subsequently talking to Long and telling him of Mr. Thrash's statement to you? [135]

A. I believe I talked to just about everybody in the shop.

Q. In doing that, was that a matter that Mr. Thrash had suggested, or was it a matter of your own initiative?

A. I don't recollect on that. It was probably a combination of both.

Mr. Boyd: Pass the witness—oh, before doing so, let me take up a couple other things.

Q. (By Mr. Boyd): Mr. Squire, showing you General Counsel's Exhibit 7, when did you affix your signature there?

A. I believe it was the 12th. Yes, it was this date here, the date it was written. I was the first one signed it. It was late in the afternoon.

(Testimony of Donald Squire.)

Q. Late in the afternoon of the 12th?

A. Yes.

Q. Were you present when McCoy signed it?

A. No. I believe I signed it and turned around and walked off.

Q. Do you remember seeing Bishop there later in the afternoon and telling him about it?

A. I said there was a letter to this effect at the time, and why I signed it, and it was up there where everybody could see it as they punched out, just as they were leaving.

Q. Did I understand your statement that you said——

A. No. I was informed that the letter was there. I was outside in the yard when everybody signed it.

Mr. Boyd: That's all. Thank you. [136]

Trial Examiner: Who informed you the letter was there?

The Witness: I don't remember. It was one of the fellows in the shop, one of the mechanics.

Trial Examiner: Did you type this yourself?

The Witness: No. I gave my ideas where some words should be stricken out, or something added or changed.

Trial Examiner: To whom did you give those?

The Witness: To Charlie Brown.

Mr. Stirling: I have no questions.

Mr. Boyd: Oh, excuse me. Let me ask you another question.

Q. (By Mr. Boyd): Mr. Squire, the shop is

(Testimony of Donald Squire.)

made up normally of around seven or eight employees?

A. I'd say that's right for a normal number.

Q. Eight or nine?

A. Eight or nine, I should say.

Q. When Mr. Thrash is absent from the plant, who is in charge of the plant?

A. I am when he's not in the plant.

Q. Pardon?

A. Not the plant, just the shop part.

Q. I mean the shop. What are your responsibilities at that time?

A. Just completely watching things for him, taking in jobs, watching the division of the work, sending out field men as necessary, just the general run of the work. [137]

Q. By whose authority do you act in his absence? A. Mr. Thrash's.

Q. He designates you to take charge?

A. Yes, sir.

Q. In taking charge, do you—first, do you estimate work? A. I have.

Q. Do you make work assignments?

A. Yes.

Q. In the matter of directing men to go into the field to take care of repairs? A. Yes, I do.

Q. Do you do that regularly when you're substituting for him? A. Yes.

Q. Have you made any recommendations concerning the discipline or the employment or the payment of employees?

(Testimony of Donald Squire.)

A. I have made suggestions several times that some men were worth more, or they were capable of better work—I mean of getting better jobs, more advanced type of work.

Q. Have those suggestions been volunteered by you, or have they been solicited by Mr. Thrash?

A. Usually volunteered, usually because I could see things that Mr. Thrash could not see, working with the men as such.

Q. Are you paid on an hourly rate or a monthly rate? A. Hourly.

Q. How does your rate of pay compare with that of the other [138] mechanics in the shop?

A. It's top field serviceman's rate; no extra for the assistant's job.

Q. In Mr. Thrash's absence, if a man asks for leave to—asks permission to leave work, if he has some personal reason for leaving, whose permission does he seek? A. Mine.

Q. Have you in any instance recommended discipline or layoff of men that have been acted on by the company? A. Not for any layoff.

Q. What type of discipline have you recommended that's been acted on?

A. I suggested that some of the men were capable of better work.

Q. That's a matter of appraising their ability?

A. Appraising their ability. I never recommended anybody being fired. I think he's intelligent enough to know that.

Q. Had you ever hired anyone in his absence?

(Testimony of Donald Squire.)

A. Never.

Q. Did you ever fire anyone in his absence?

A. No.

Q. And you have never changed anyone's rate of pay?

A. I don't feel that's in my authority.

Q. How long have you had this degree of authority that you describe? [139]

A. Oh, I just kind of worked into it about eight months ago, I believe.

Q. And prior to that, who exercised comparable authority?

A. Cliff Schafer. He's not working for us now.

Q. At any time other than Mr. Thrash has told you to take charge in his absence, has he advised you of the degree of your authority, whether or not you were exceeding it, whether or not you were failing to exercise it?

A. There's only one time. I was working under one of the shop trucks. I'd been there about an hour and a half, and he came back in there and one of the fellows was goofing off, and he told me the next time the fellow was gone to take off my coveralls and put my tools up so I could go and run the shop better.

Q. He admonished you then to make sure the others worked? A. Yes.

Mr. Boyd: That's all. Thank you, sir.

(Testimony of Donald Squire.)

Cross-Examination

By Mr. Stirling:

Q. One question, Mr. Squire: Are other mechanics of Howard-Cooper at Central Point receiving the same hourly rate of pay as yourself?

A. I believe there is, yes.

Mr. Stirling: That's all I have.

Redirect Examination

By Mr. Boyd:

Q. Do they get the same amount of overtime though that you do? [140]

A. The one person that I'm sure is getting the same rate does get the same amount; in some cases, more, and sometimes I get more.

Q. And that one person is Henagar?

A. Yes.

Mr. Boyd: That's all. Thank you.

Trial Examiner: You're excused.

(Witness excused.)

Mr. Boyd: Call Mr. Brown.

CHARLES A. BROWN, JR.

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Your name is Charles A. Brown, Jr.?

A. Yes, sir.

Q. You live where?

A. It's a rural address, Route 2, Box 193-A, Central Point.

Q. At the present time, you're employed by whom?

A. International Harvester Company, farm equipment store.

Q. And had you previously been an employee of the Howard-Cooper Corporation? A. Yes.

Q. When did your employment with Howard-Cooper Corporation terminate?

A. Near the middle of January; exactly I can't tell you right [141] offhand.

Q. Do you remember if it was at the end of the week, the last day of your work?

A. Beg your pardon?

Q. What day of the week was the last day you worked? A. Friday.

Q. On a Friday. Were you in the employ of the company in November, 1955? A. Yes.

Q. In what capacity? A. Mechanic.

Q. Now, at that time, Mr. Brown, in November—strike that. I hand you here a document

(Testimony of Charles A. Brown, Jr.)

marked for identification General Counsel's Exhibit 13. First, I ask you to examine the form of it as it appears on General Counsel's Exhibit 2, and, with respect to the form of GC-2, may I ask whether you received a form like that, identical with that, in November of 1955? A. Yes, sir.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Q. (By Mr. Boyd): And from whom, and under what circumstances?

A. As I remember, I believe Alan Bishop handed me the card. I wasn't there the day that the union representative happened to contact the rest of them. I believe I was there the following morning and was handed one of these cards. [142]

Q. All right. With regard to the card that you received, what did you do with that?

A. Put it in my pocket.

Q. And as of three nights ago, you handed it to me? A. I handed it to you.

Q. Did you get another card identical with that?

A. Yes.

Q. And where did you get it?

A. At a meeting that was held in November, the exact date I'm not certain of. Nearly all the employees of the shop were there to meet with Harry Whiteside.

Q. And the card that you received at that time of the meeting, what did you do with it?

(Testimony of Charles A. Brown, Jr.)

A. I signed it and returned it to Harry Whiteside.

Q. Now, directing your attention to the card in your hand, marked GC-13 for identification, will you examine the entries on that and state whether the card which you signed was filled out by you to contain the entries and notations shown in typewriter on General Counsel's Exhibit 13?

A. Yes, it is the same as the one I signed.

Mr. Boyd: I offer GC-13 in evidence.

Trial Examiner: I'll receive it with the same comment as made on previous offers of the same cards and, in doing so, I'm overruling Respondent's continuing objection.

(The document heretofore marked General Counsel's Exhibit No. 13, for identification, was received in evidence.) [143]

GENERAL COUNSEL'S EXHIBIT NO. 13

Mail This Card Today

Authorization for Union Representation Under the Federal Labor Laws of the United States Government!

Do you want the UAW-CIO to bargain for you for a signed labor contract providing for wage increases, better vacation pay, job security, and other improved conditions of employment?

YES ☒ NO ☐ Date.........

(Testimony of Charles A. Brown, Jr.)

My Signature: Charles A. Brown, Jr.
Phone: 3-2764.
My Address: 4095 So. Pacific Highway.
City: Medford.

I am employed by: Howard Cooper Co.
How long? 16 mo.
Kind of work I do: H. D. Mech.
Present Wage Rate: $2.05.
I am on: Day ☐ Swing ☐ Graveyard ☐ Shift.

Drop This Filled Out Card in the Mail Box Today!

All cards are kept confidential by the UAW-CIO and by the Federal Government.

Received in evidence June 25, 1956.

Q. (By Mr. Boyd): Now, Mr. Brown, going to the date of the 11th of January, did you attend a meeting conducted in the office of Mr. Thrash where Mr. Parker spoke to the employees?

A. No. I was not at work that day.

Q. You did not work that day?

A. No.

Q. Very well. Going then to the next day following, which was the 12th of January, were you at work? A. Yes.

Q. What took place on the morning of the 12th?

A. After we had started work, I can't remember the exact rotation in which the men were called

(Testimony of Charles A. Brown, Jr.)

in, but I believe Al was first and I believe I was next called into—Hy asked me to come to the office and talk with him.

Q. And what was the conversation you had with Mr. Thrash in his office at that time?

A. Well, he filled me in on the meeting that had taken place the day before, what had transpired, and we talked about the increase and——

Q. Let me ask you: What did he tell you, if he told you anything, concerning Mr. Parker's statement about the increase?

A. Basically what's been said here before. It was that the increase had been arranged for by the company shortly after the first of the year, but, since this union activity had taken place, that it was doubtful that the raise could be granted [144] legally.

Q. Now, this is what he told you that Parker had said the day before? A. Yes.

Q. Then what more did he have to say concerning it?

A. Well, we discussed the possibilities of getting—at that time, I told him I was leaving and taking another job.

Q. Had you told him prior to that time?

A. No.

Q. That was the first disclosure that you made to him? A. Yes.

Q. That you were intending to take another job? A. Yes.

(Testimony of Charles A. Brown, Jr.)

Q. All right. Now, then, what more did you say and he say in relation to that?

A. Well, we talked about this petition that's been presented. I don't know just exactly how it did come up about the petition, whether it—anyway, it came up that maybe it should take the form of a letter with the signatures of the employees attached and copies sent to the National Labor Relations Board, and Harry Whiteside, and to the company, asking that the union activity be suspended there, that the employees were satisfied with the working conditions as Mr. Parker had presented them, and——

Q. Well, now, before—may I stop you just a moment? You say [145] mention was made of whether it might be either a letter or a petition, but who first broached the subject of the employees doing anything?

A. Well, I really can't say for sure because we talked about it there, and I may have asked him that, since I was leaving anyway, I would be about as near a disinterested party as could be found, if I couldn't do something that would help the fellows get their raise in wages.

Q. Well, is it your recollection that you did ask him then?

A. No, I can't say that for sure, but I say that could be the way it happened.

Q. Do you remember anything that he suggested specifically?

A. So far as specific suggestion is concerned, no,

(Testimony of Charles A. Brown, Jr.)
I can't because the way we talked back and forth down there, we did come to an agreement that a petition would probably be the proper form to use, but whether he made the suggestion or whether I made it, or somebody else came up with it, I don't know.

Q. You're saying, as a result of your discussion with him, it was determined between the two of you that the appropriate thing was to prepare a petition? A. Yes.

Q. And then—you say this conversation took place rather early on Thursday morning?

A. Yes, just shortly after I went to work.

Q. Well, after having this discussion with him, what did you [146] do?

A. Well, I started a rough draft of the petition.

Q. Before doing that, did you have any conversations with other employees?

A. I talked with Don Squire, and a couple of the other fellows that were around there and asked them their opinion on it.

Q. Had Mr. Thrash made any suggestion to you concerning this matter of discussing it with other employees?

A. No, I don't believe he did. I think that was my own initiative.

Q. Now, as a result of the discussions you had with them, what did you do then?

A. It was probably after noon when I finally wrote up this petition in handwriting, about the way it is now, and I showed it to Squire and Long

(Testimony of Charles A. Brown, Jr.)

and a couple of other fellows and asked them if they thought that was about right, and received their comments and suggestions.

Q. Now, at that time, did your handwritten copy show that a copy of it was to be delivered to the company, and a copy of it to—— A. No.

Q. ——and a copy of it to the union?

A. No. I made that statement orally.

Q. You said orally to them that that was your intention? A. Well—— [147]

Q. How did that come about that you did put this on there?

A. I believe that in the discussions back and forth between Don and Hy and myself that we decided that those——

Q. Between Don and Hy and yourself, you say?

A. Yes—well, not all together at any one time, but just talking back and forth at different times, that copies should be sent to these three places.

Q. Do you recall who specifically suggested that? A. No, I don't.

Q. Do you remember any incident of the matter being held up for awhile, the matter of preparing the document be held up for awhile until someone got some additional information?

A. Yes. Hy and I talked about that. He said he would see if he could get a little more information.

Q. And more information about what?

A. About who should receive copies of this letter.

Q. And did he later tell you what information he got?

(Testimony of Charles A. Brown, Jr.)

A. Only as a thought. He didn't make a definite statement.

Q. Well, what was his—to the extent that he expressed himself, how did he express himself?

A. He said he thought that copies should go to Whiteside, the Board, and to the company.

Q. This he reported to you some time later?

A. Yes.

Q. He said he'd find out? [148] A. Yes.

Q. Then had you yet prepared it in typewritten form when he made this suggestion to you?

A. No.

Q. It appears to be in typewritten form in the document in evidence as General Counsel's Exhibit No. 7. Is this the document that was prepared?

A. Yes.

Q. And who typed it? A. I did.

Q. And where did you type it?

A. In Hy's office.

Q. Where did you get the equipment and the paper to type it?

A. I asked the office girl, the secretary, for the paper, carbon paper, envelopes.

Q. Now, about what time of the day was it that you did the transcribing of it onto this form?

A. It was in the afternoon, at least by the middle of the afternoon, that late.

Q. And the form of it that you used in transcribing was this longhand draft that you had prepared, plus the entry of copy to Harry Whiteside and Howard-Cooper Corporation, is that correct?

(Testimony of Charles A. Brown, Jr.)

A. That's right.

Q. Having prepared it, what did you do with it?

A. I prepared these three copies and one additional, which I [149] kept myself.

Q. That is, you prepared it so carbon copies would be made at the same time? A. Yes.

Q. And with respect to leaving it for signature, was it left so that the carbon copies would be marked at the same time? A. Yes.

Q. Very well. Now, go ahead.

A. I didn't address the envelopes until the next morning. I prepared this petition and placed it next to the time clock so everybody could see it. Then I told most of the ones I ran into. Whether I told them all or not, I can't remember, but I did tell most of the ones that I ran into, that the petition was there, and I don't remember who all signed it or at what particular time, but I do know that it wasn't until the next day that all of the signatures were on here. At that time, I picked it up, addressed the envelopes and took them up in the front office and mailed them.

Q. Now, you addressed the envelope to the Labor Board. Did you also address the envelopes to the company and to Whiteside?

A. Yes. I believe the envelope that was addressed to the company was addressed to the attention of Mr. Parker.

Q. Now, your signature appears midway down on the document. Do you remember whether you

(Testimony of Charles A. Brown, Jr.)
signed it on the date that you prepared it, or the next day? [150]

A. I signed it the next morning.

Q. Is there any explanation of why you deferred until the next morning?

A. Not particularly, because I knew it couldn't make a great deal of difference, one way or another, to me what came of it. My only intent in preparing this was that, if I could help the fellows out to get that raise a little bit quicker than what they would normally get it, why, I was all for it.

Q. The matter of the language that is used in General Counsel's 7 was a matter of your own choice? A. Mine.

Q. Before it was transcribed though in typewritten form, did you discuss it with Mr. Thrash as to its adequacy, whether or not it was proper in form?

A. I don't believe I discussed it with Hy. I think the only discussion that was made on it was with Don and some of the other fellows in the shop. I don't believe Hy saw a copy of this letter at all until after—I couldn't even say that he saw it after it was signed, for sure.

Q. Now, you mentioned that you ended your employment on a Friday in January? A. Yes.

Q. What Friday was it in relation to the day when you signed this paper? Was it that same Friday, or the Friday following?

A. It would have had to have been that same Friday. [151]

(Testimony of Charles A. Brown, Jr.)

Q. Did you get an increase in your pay in that week for that last week? A. No.

Q. And you were not about the plant then after that week?

A. No. I picked up my tools that Friday evening, and that was all, outside of I stopped there a couple times to chew the fat with the boys, and that's all.

Mr. Boyd: That's all. I pass the witness.

Mr. Stirling: I don't believe I have any questions of Mr. Brown.

Trial Examiner: Mr. Brown, you say you addressed a copy of this to the National Labor Relations Board?

The Witness: Yes, sir.

Trial Examiner: Did you have the address and all that yourself?

The Witness: Yes.

Trial Examiner: And where did you come in possession of that, and when?

The Witness: How do you mean, where did I?

Trial Examiner: How did you happen to have the correct address of the Board to mail this to them?

The Witness: I believe Vince supplied that for me, the office manager. [152]

* * *

JOHN G. HENNAGAR

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Your name is John G. Hennagar?

A. Right.

Q. Where do you live?

A. 119 Pine Street, Central Point, Post Office Box 92.

Q. You're an employee of Howard-Cooper Corporation? A. That's right.

Q. In what capacity? A. Mechanic.

Q. Were you so employed in November of last year? A. Right.

Q. And your employment in that capacity continues up to the present time?

A. That's right. [153]

Q. In November of last year, did you see a document identical with General Counsel's Exhibit No. 2? A. Right.

Q. And where?

A. At the home there. I got an envelope from Mr. Whiteside.

Q. And it contained one of those? A. Yes.

Q. And the one that you received at that time, what did you do with it?

A. I mailed it to him.

Q. Before mailing it to him, did you fill it out?

A. Yes.

(Testimony of John G. Hennagar.)

Q. I'll hand you here a document marked for identification General Counsel Exhibit No. 14 and ask you to look that through and state whether the card that you filled out at the time was filled out in the form in which you find General Counsel's Exhibit 14? A. That's right.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 14 for identification.)

Q. (By Mr. Boyd): And this you mailed to Mr. Whiteside? A. That's right.

Q. And it was mailed to him in what month?

A. In November.

Mr. Boyd: I offer GC-14 in evidence. **[154]**

Trial Examiner: Same ruling as previously, and same exception noted.

(The document heretofore marked General Counsel's Exhibit No. 14 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 14

Mail This Card Today

Authorization for Union Representation Under the Federal Labor Laws of the United States Government!

Do you want the UAW-CIO to bargain for you for a signed labor contract providing for wage in-

(Testimony of John G. Hennagar.)

creases, better vacation pay, job security, and other improved conditions of employment?

YES ☒ NO ☐ Date........

My Signature: J. G. Henagar.

My Address: P. O. Box 92.

City: Central Point.

I am employed by: Howard-Cooper Co.

How long? 6 mo.

Kind of work I do: Shop Mechanic.

Present Wage Rate: $2.15.

I am on: Day ☐ Swing ☐ Graveyard ☐ Shift.

Drop This Filled Out Card in the Mail Box Today!

All Cards are kept confidential by the UAW-CIO and by the Federal Government.

Received in evidence June 25, 1956.

Q. (By Mr. Boyd): Were you at the plant on January 11th? A. That's right.

Q. Did you hear the remarks that Mr. Parker made to the employees that morning?

A. I did.

Q. You attended the meeting?

A. I sat in at the meeting.

Q. You have heard the testimony of Mr. Bishop and of Mr. Long concerning the development that took place that morning. Is it your recollection—is your recollection of what took place substantially as

(Testimony of John G. Hennagar.)

they have testified to? A. Not exactly.

Q. Well, if there's a difference, what are the differences that you recall?

A. Well, I don't recall hearing him make the statement that he called these other places for——

Q. You do not recall a reference from Mr. Parker of having called the Hopper Company?

A. The Hopper and the Caterpillar Company the previous evening. I don't recall that.

Q. Are you saying that you do not recall that he made mention [155] of having done it on the previous evening, or that he had not made mention of it at all as you recall?

A. No; on the previous evening.

Q. That is, you remember him saying that he had done it, but you don't remember he said he did it on the previous evening?

A. That he had made contact with them and that their wages—our wages were lower than theirs, and they agreed to bring it up.

Q. I'm sorry, I didn't hear you.

A. That our hourly rate was lower than theirs, and they agreed to bring it up. So, he was giving us a blanket raise of 10 cents.

Q. You remember he did make that remark, but you don't remember him saying that he had done this on the preceding evening?

A. No, I don't remember that.

Q. All right. Is there any other difference in your recollection from the events that occurred that day as testified to by Bishop and Long?

(Testimony of John G. Hennagar.)

A. Well, another point that was made was about the paid holidays. I brought that up myself.

Q. You brought up a complaint about the paid holidays? A. Yes.

Q. What was your complaint about paid holidays?

A. About having to work there six months before we got paid holidays. [156]

Q. And when you voiced that complaint, that the company required you to work there for six months before getting a paid holiday, what response did you get from Mr. Parker about that?

A. Mr. Parker turned around to Mr. Heaton and Mr. Thrash and asked them if that was true, and they both verified the statement that it was true, and that it wouldn't be that way any more. I mean Mr. Parker said he'd take care of that right there.

Q. That they would change that? A. Yes.

Q. Was there any other matter that you remember now that was mentioned by either the workmen or Mr. Parker that hasn't been mentioned by Mr. Long or Mr. Bishop? A. Offhand, no.

Q. And is your recollection of those other things, which they did mention, or rather would your testimony be substantially as they have testified?

A. Well, I couldn't basically say "yes" to it or "no" either because——

Q. Well, that is——

A. ——There is points I didn't quite catch that

(Testimony of John G. Hennagar.)
probably they got, and points that I got and they didn't catch.

Q. I see. Well, then, what have they testified to that you have no recollection of having occurred?

A. Well, the one about the plant in Seattle and guys being [157] hurt on the job, and stuff like that. I don't recollect him mentioning that there was any of that going on in there, of that going on at the plant there.

Q. Was there anything else?

A. No; offhand, other than the coveralls and the insurance.

Q. You remember that those things were mentioned? A. Yes.

Q. Was there talk of a coffee break?

A. Yes, there was a coffee break.

Q. Incidentally, when was the coffee break instituted?

A. Well, to the best of my knowledge, the first time I had any access to it was on the following Monday morning.

Q. On the following Monday is your recollection?

A. Yes. It could have been in before then because, as I say, I work in the field quite a bit and probably wasn't around when the coffee break started.

Q. When the coffee break was provided, it was at what hour? A. Ten minutes to 10:00.

Q. Until what time?

A. Well, there was no specific time set on it to me.

(Testimony of John G. Hennagar.)

Q. I see. Now, was it simply a matter of providing time in which to drink coffee, or did they provide the coffee?

A. I assumed that it was time to drink your coffee.

Q. Well, did you carry your coffee, or was it provided at the plant? [158]

A. It was provided at the plant.

Q. That is, they provided the coffee?

A. Yes.

Q. Did they provide cocoa?

A. Provided cocoa, sugar and cream.

Q. And the facilities for preparing it?

A. That's right.

Q. And that practice was instituted, so far as you know, the following Monday?

A. Yeah, that was the first time I had any access to it.

Q. Now, let's go back to that day of Wednesday, the 11th. After the meeting, was there any discussion with you concerning the meeting, between yourself and Mr. Thrash?

A. Well, in a round about way, yes.

Q. And when did that take place?

A. I was in preparing for a work report and we brought up the subject, generally speaking, of the conditions and everything, and at that time Mr. Thrash told me he didn't figure that they had accomplished everything that they was out after, and I made a suggestion to him that they should call them in and talk to them one at a time there. I

(Testimony of John G. Hennagar.)

said that they might not be more reluctant to him than they would be speaking to Mr. Parker in general.

Q. Now, did he thereafter do that, to your knowledge?

A. As far as I know. Some of the fellows told me that he [159] called them in and talked to them the next day.

Q. Were you at the plant the next day?

A. Early in the morning, and then at noon, and then the next morning.

Q. So, you were out of the plant much of that day? A. That's right.

Q. Thursday, the 12th? A. Yeah.

Q. Did he talk with you personally on Thursday, the 12th, personally? A. No.

Q. On what day will you state was it that you signed the document, General Counsel's Exhibit 7?

A. Friday morning, the 13th.

Q. Friday, the 13th? A. Yes.

Q. And yours appears to be the last name. Were all these other names on the paper ahead of yours?

A. They were all there.

Q. Before you signed? A. That's right.

Q. Do you remember at what time of the morning it was that you signed the paper?

A. Well, it couldn't have been later than 8:15 because I was going out on a job. [160]

Q. Pardon?

A. It couldn't have been later than 8:15 because I was going out on a job.

(Testimony of John G. Hennagar.)

Trial Examiner: That's 8:15 in the morning?

The Witness: Yes, sir.

Q. (By Mr. Boyd): Was there any discussion between you and Mr. Thrash at this time concerning any prior labor trouble in the plant?

A. I think the fact was brought up that they had had a strike here once before and the plant was closed down due to that fact, not no special talk or anything like that. I mean not specifically connected with this trouble that they were having at that time.

Q. When was it that—first, who was it that told you this? Who was the person that was in conversation with you?

A. During the time of the conversation about this strike?

Q. Yes. A. Mr. Thrash and myself.

Q. And where did it take place?

A. In the office.

Q. And when in relation to January 11th or 12th was it that that took place?

A. That was, I believe, on the 13th that that took place, Friday morning.

Q. On Friday morning? [161]

A. That was after the petition had already been signed.

Q. After you had already signed the petition?

A. Yes.

Q. And how did you happen to be talking with him at that time?

A. Oh, as a general rule, I've worked in union shops before and it come about we was talking of

(Testimony of John G. Hennagar.)
the way the union operates in the big shops, and the general run of the conversation with him as to this other——

Q. With reference to the former episode?

A. Yes.

Q. Now, do I understand from your statement that he said that, when there was a strike there before, that the shop had been shut down? Was that your statement? A. Yeah.

Q. Was that his statement at that time?

A. That they had to close the shop down, or did close the shop down, I believe is the way he put it.

Q. Because of the strike?

A. Yes, or because of the union affair some way.

Q. Now, I'm concerned to know your best recollection of what it was he did say that resulted in closing the shop down.

A. Well, to the best of my recollection, they voted for the union and they just closed the shop down.

Q. The employees had voted for a union, and then they closed the shop down? [162]

A. Yes.

Q. Well, was there a strike involved? Did he mention any strike? A. No.

Q. He did not mention a strike? A. No.

Q. He mentioned there had been a vote for a union and then they had shut the shop down?

A. Yes.

Q. Did he tell you when this had occurred?

A. No, he didn't give me no dates at all.

(Testimony of John G. Hennagar.)

Q. But it was some prior event at the Central Point plant?

A. That's right, and also there wasn't no indication that it would be done this time.

Q. I beg your pardon?

A. He didn't make no indication that it would be done this time.

Q. He made no statement that that was going to happen again? A. No.

Q. He just said that happened before?

A. That's right, the previous time.

Q. Now, am I right in understanding that you did get a pay increase? A. That's right.

Q. And it became—you received it first when you received your pay check on what date? [163]

A. I received mine on the 21st because I didn't get in in time Friday evening to pick it up on the 20th.

Q. And that pay check you received on the 21st was for what work week?

A. From the 9th to the 14th.

Q. The 9th through the 14th? A. Yes.

Mr. Boyd: That's all.

Cross-Examination

By Mr. Stirling:

Q. Mr. Hennagar, you testified that you signed a card similar to this? A. Yes.

Q. Do you know about when you signed that card?

(Testimony of John G. Hennagar.)

A. Somewhere between the 7th and the 15th of November.

Q. Of '55? A. Yes.

Q. Do you know whether you had a date on the card?

A. I'm not positive. I would assume that I did.

Q. What did you understand that you were doing by signing that card?

Mr. Boyd: Object. I suppose the card speaks for itself.

The Witness: I understand from that——

Trial Examiner: Just a minute. Let me rule on the objection. Did you read the card, sir, before you signed it?

The Witness: Not thoroughly. [164]

Trial Examiner: Well, will you explain what you mean by "not thoroughly"?

The Witness: Well, I noticed the heading there, and also Mr. Whiteside said they were to have a meeting of all the boys, and that that would be to grant them the privilege to have a meeting, and I took it for granted, after I had seen one of the cards, that that's what it was for.

Trial Examiner: He may answer your question.

Mr. Stirling: I'll ask this question if I may, Mr. Examiner:

Q. (By Mr. Stirling): I take it from your testimony, Mr. Hennagar, that you signed this card with the understanding that it was a card authorizing a meeting of some sort, is that right?

A. Yes, that was the first impression I had of it.

(Testimony of John G. Hennagar.)

Q. Do I understand from that that you did not realize that you were signing a card authorizing the UAW union to bargain and negotiate a labor contract for you?

A. Not until after I read the card more thoroughly—I mean read another card.

Q. But at the time you signed, you didn't understand that?

A. I didn't fully understand it at that time, that's true.

Q. When was it that you became—that you came to this understanding of it?

A. I believe it was after the first meeting they had.

Q. And what was your understanding at that time? I mean, what [165] did you understand then at that time as to what this card authorized the——

A. I understood at that time that was what it was actually for, was for them to represent us.

Mr. Stirling: I think that's all the questions.

Redirect Examination

By Mr. Boyd:

Q. Well, to clarify that, Mr. Hennagar, at the time that you signed this document here, General Counsel's Exhibit 7—— A. Yes.

Q. ——you did that with the understanding that this was to be the meeting withdrawing the authorization that you had already given to the union?

A. That's right. [166]

* * *

HOMER BILLUPS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Your name is Homer Billups?

A. Yes, sir.

Q. You live in Central Point?

A. Yes, sir.

Q. You work for the Howard-Cooper Corporation? A. Yes, sir.

Q. You were working for them in January of this year? A. Yes.

Q. And November of last year? A. Yes.

Q. I hand you General Counsel's Exhibit 2, which has been received in evidence, and ask you if you received a card identical with that in November of last year? A. Yes.

Q. Where did you receive yours?

A. I received mine from Alan Bishop.

Q. And what did you do with your card?

A. I signed it and filled it out. [167]

Q. You filled it out and signed it? A. Yes.

Q. And what did you do with it after that?

A. I don't remember if I mailed it or gave it to Harry Whiteside at the meeting.

Q. You did go to the union meeting?

A. The first one, yes.

Q. That was held in November? A. Yes.

(Testimony of Homer Billups.)

Q. I hand you here a document marked for identification General Counsel's Exhibit 15 and ask you to examine that carefully and state whether you, in filling out your card in November of last year, filled it out with the entries on it as shown on this typewritten reproduction, General Counsel's Exhibit 15? A. Yes, I did.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 15 for identification.)

Mr. Boyd: I offer General Counsel's 15 in evidence.

Trial Examiner: Same ruling as on the previous offer, and with the same exception noted.

(The document heretofore marked General Counsel's Exhibit No. 15 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 15

Mail This Card Today

Authorization for Union Representation Under the Federal Labor Laws of the United States Government!

Do you want the UAW-CIO to bargain for you for a signed labor contract providing for wage increases, better vacation pay, job security, and other improved conditions of employment?

YES ☒ NO ☐ Date........

(Testimony of Homer Billups.)

My Signature: Homer Billups. Phone: 4-1202
My Address: P.O. Box 674.
City: Central Point. Zone No. ....

I am employed by: Howard-Cooper Co.
How long: 9 months.
Kind of work I do: Mechanic Dept.
Present Wage Rate: $2.00.
I am on: Day ☐ Swing ☐ Graveyard ☐ Shift.

Drop This Filled-Out Card in the Mail Box Today!

All cards are kept confidential by the UAW-CIO and by the Federal Government.

Received in evidence June 25, 1956.

Q. (By Mr. Boyd): Mr. Billups, you attended the meeting on January 11th? A. Yes. [168]

Q. With the men in the shop? A. Yes.

Q. You heard the testimony of Long and Bishop and of the previous witnesses? A. Yes.

Q. Do you have any recollection of anything having been said during the course of the meeting that differs substantially from the testimony of Long and Bishop and Hennagar?

A. No, I don't believe so. No, I think that pretty well covers it.

Q. If you were to testify on the subject, you would testify substantially as they have testified?

A. I think so, yes.

Q. Passing that subject, on the following day,

(Testimony of Homer Billups.)
did you—or the next following day, Friday morning, did you sign this document, General Counsel's Exhibit 7? A. Yes.

Q. At the time you signed it, did you know whether Mr. Whiteside had expressed himself as to whether you people should sign it—whether the people who had signed cards with the union should sign it? A. Yes, I think so.

Q. You heard that through whom?

A. Through Alan Bishop, I believe.

Q. And you got the 10-cent increase in your pay check the [169] next week following?

A. Yes.

Mr. Boyd: I'll pass this witness.

Cross-Examination

By Mr. Stirling:

Q. Mr. Billups, why did you sign this?

Mr. Boyd: I object.

Q. (By Mr. Stirling): This petition?

Trial Examiner: Will you identify it?

Mr. Stirling: Yes, I will.

Q. (By Mr. Stirling): I'm referring to General Counsel's Exhibit 7. Is that your signature on it? A. Yes.

Q. And why did you sign that, Mr. Billups?

A. Well, I wanted a raise. It was the understanding that we'd do away with the union and go ahead and get our raise.

Q. And you men talked it over, and you figured that was the way to do it? A. Yes.

(Testimony of Homer Billups.)

Q. Did you have any other reason for withdrawing your authority to the union?

A. Well, I was more or less like Hennagar on this card deal. I signed something I didn't actually know what I was signing, and this was my way of withdrawing that.

Mr. Stirling: I believe that's all.

Mr. Boyd: I have one question. [170]

Redirect Examination

By Mr. Boyd:

Q. From whom did you hear that, by signing this document, it would result in you getting a raise?

A. I think that was just general talk around the shop.

Q. Shop talk? A. Yes.

Mr. Boyd: That's all.

Trial Examiner: Well, Mr. Boyd, I'm not satisfied with the witness' testimony at this point. Do you want to develop it further, or do you want me to develop it further? He says he didn't know what he was signing when he signed the authorization. I want more detail on that. Do you not care to develop it?

Mr. Boyd: Well, he has testified that he did sign this—I understood his testimony was he signed this partly in order to get the raise and partly to withdraw the authority which he previously had given to the union.

The Witness: That's right.

(Testimony of Homer Billups.)

Mr. Boyd: That's what I understood his testimony to be, Mr. Examiner.

Trial Examiner: That's the way I understood it, too. Now I see you don't want to develop this.

Now, Mr. Witness, you have testified that you signed one of these cards. That is, a card that has the same form as this one that's been introduced in evidence.

The Witness: Yes. [171]

Trial Examiner: Did you read the card before you signed it?

The witness: Not thoroughly.

Trial Examiner: Well, explain what you mean by "not thoroughly."

The Witness: Well——

Trial Examiner: Did you read part of it, but not all of it?

The Witness: I think I read all of it, but I didn't thoroughly understand what it all meant. I thought that it was just——

Trial Examiner: Will you take the card and tell the Trial Examiner what it was that you read there that you didn't understand?

The Witness: Well, I thought it was a card just to authorize this meeting.

Trial Examiner: Well, will you tell me what are the words on that card that you didn't understand when you read them?

The Witness: Well, I guess there's no particular wording I didn't understand. I just read it over hurriedly and decided to go to the meeting, and that's what I thought it was for, the authorization.

(Testimony of Homer Billups.)

Trial Examiner: Did the card say anything about a meeting?

The Witness: No, sir.

Trial Examiner: Do you have any other questions of this [172] witness?

Mr. Stirling: No, I haven't.

Trial Examiner: You're excused.

Mr. Boyd: May I ask one further question?

Trial Examiner: Yes.

Q. (By Mr. Boyd): You did attend the meeting? A. The first meeting.

Q. And at that meeting, it was clear to you, was it not, that the union was going to represent you in bargaining, but you asked that the matter be delayed until January?

Trial Examiner: That's rather leading.

Mr. Boyd: Yes, it is.

Q. (By Mr. Boyd): What was determined at the meeting?

A. Well, they just decided to wait till after the first of the year to do anything.

Q. To do anything, and when you say "to do anything," will you explain what you mean?

A. Well, to go ahead and notify the company that they were going to bargain with them—try to bargain with them.

Q. So, at the time of the first meeting, you did then understand that you had authorized the union to represent you? A. Yes.

* * *

HUBERT E. CURTIS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Boyd:

Q. Your name is Hubert E. Curtis?

A. Right.

Q. You live where?

A. 24 Ash Street, Central Point.

Q. And you're employed by whom?

A. Howard-Cooper.

Q. And were you in November of last year?

A. Yes.

Q. And January of this year?

A. Yes, sir.

Q. In November of last year, did you see a document such as that marked General Counsel's Exhibit 2? A. Yes.

Q. Where did you see it?

A. The first time I saw it was at the meeting that was held in the middle of November.

Q. And you attended that meeting?

A. Yes, sir.

Q. What did you do with the card that you saw? [174]

A. Well, after I was showed that the majority of the employees had signed, I didn't see where it would make any difference, and I went ahead and signed it and handed it in with the rest of them.

(Testimony of Hubert E. Curtis.)

Q. You turned it in to whom?

A. Harry Whiteside.

Q. That evening? A. That evening.

Q. I show you a document now marked for identification General Counsel's Exhibit 16. Will you examine that, please, and state whether the entries made on that card in typewriting are identical with the entries that you made on the card that you turned in to Mr. Whiteside at this union meeting in November?

A. The best I remember.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 16 for identification.)

Mr. Boyd: I offer in evidence General Counsel's Exhibit 16.

Trial Examiner: Same ruling as previously, exceptions noted.

(The document heretofore marked General Counsel's Exhibit No. 16 for identification, was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 16

Mail This Card Today

Authorization for Union Representation Under the Federal Labor Laws of the United States Government!

(Testimony of Hubert E. Curtis.)

Do you want the UAW-CIO to bargain for you for a signed labor contract providing for wage increases, better vacation pay, job security, and other improved conditions of employment?

YES ☒ NO ☐ Date........

My Signature: Hubert E. Curtis. Phone: 4-1192
My Address: 24 Ash St., P.O. Box 25.
City: Central Point. Zone No. ....

I am employed by: Howard-Cooper Co.
How long: 6 weeks.
Kind of work I do: Welder.
Present Wage Rate: $2.05.
I am on: Day ☐ Swing ☐ Graveyard ☐ Shift.

Drop This Filled-Out Card in the Mail Box Today!

All cards are kept confidential by the UAW-CIO and by the Federal Government.

Received in evidence June 25, 1956.

Q. (By Mr. Boyd): Were you at the plant on January 11th? A. Yes.

Q. What notification did you get of the meeting? [175]

A. Mr. Thrash came out and told me that there was a meeting in his office.

Q. Was that the extent of the notice that he gave you?

A. A few minutes before, he came out and

(Testimony of Hubert E. Curtis.)
asked me when I was hired in, and then a few minutes later he came back and notified me to come in the office to attend a meeting.

Q. Now, when he asked you when you were hired in, what information did you give him?

A. I told him approximately October 26th.

Q. At the time you hired in, was this man Carroll working then?

A. No. He was hospitalized, is the way I understand it.

Q. And did he ever come back to work after you hired in? A. No.

Q. You were hired in what capacity?

A. As a welder.

Q. And what was his capacity then?

A. A welder.

Q. Now, you attended the meeting?

A. Yes.

Q. You've heard the testimony of Bishop and Long concerning what developed at the meeting. Do you remember anything more developing?

A. Not at the meeting, no; approximately the same.

Q. And do you remember: Did they testify to matters that occurred that you do not recall occurring? [176]

A. Not specifically.

Q. If you were called upon to relate what did develop in the course of that meeting, would your testimony be substantially the same as theirs?

A. Basically, yes.

(Testimony of Hubert E. Curtis.)

Q. Following the meeting, did you have any conversations with Mr.—well, with anyone?

A. I went home that night and I got to thinking about the contact that Mr. Thrash made before the meeting, and I felt that, seeing as how I was a new employee, he might or the office might feel that I was being planted there by the union. I didn't want him to feel that way.

I went back to the plant and had a talk with him that evening.

Q. That was on Wednesday evening?

A. Yes, sir.

Q. In the course of that discussion, what developed?

A. Oh, I don't remember exactly. I stated why I had hired in over there, why I was in this locality, which doesn't pertain to this. It's my own personal troubles, and he asked me what I felt or what I thought was basically the trouble, and I told him more money and the distribution of overtime was the basic complaint of most of the boys.

Q. Did you—was there any discussion between you and Thrash about talking with other people? [177] A. I don't recall any.

Q. Was any explanation made by him of why he asked you when you hired in?

A. The only explanation given me was he wanted to find out whether I was eligible for Christmas pay, I believe.

Q. For Christmas pay?

(Testimony of Hubert E. Curtis.)

A. Paid holidays, Thanksgiving or Christmas, if I was in long enough for that or not.

Q. Did he tell you whether you were eligible?

A. He didn't state that.

Q. Did you receive the Christmas pay?

A. No.

Q. Or the Thanksgiving pay? A. No.

Q. Were you called in the following day?

A. No.

Q. Did you thereafter sign this document here, General Counsel's Exhibit 7?

A. I believe I signed this one Friday morning some time.

Q. That was the morning of the 13th?

A. I don't know the date.

Q. Did you thereafter receive a pay increase?

A. Yes.

Q. And that was—when did you receive your check showing the pay increase? [178]

A. I believe the latter part of January. I don't recall for sure the date.

Q. Well, do I understand from your answer that your pay increase was not for the work week of January 9th to 14th?

A. No, I wouldn't say that because I don't recall the specific date.

Q. You just don't have a clear recollection of when the increase did come?

A. I don't have any clear recollection when I did discover the raise.

(Testimony of Hubert E. Curtis.)

Q. Was it a matter of knowledge to you that others at the same time got their raise?

A. I believe the following week it came to my attention, and I figured my check out and it showed that I had received it.

Q. So, you knew that you got yours the following week? A. Yes.

Q. Up until the time you got your check, had you yet been informed that you were going to get the raise?

A. Not other than rumor, talks, shop talk.

Mr. Boyd: That's all. I pass the witness.

Mr. Stirling: I don't believe I have any questions of Mr. Curtis. [179]

* * *

Mr. Stirling: Well, I believe that there were a total of 11 employees in the unit at the time.

Mr. Boyd: That is right. I would stipulate that there were 11 employees in the unit.

Trial Examiner: Do you accept that stipulation?

Mr. Stirling: Yes.

Mr. Boyd: That actually does exclude this man who had gone off because of his illness. He had been ill since October. Meeting it that way, I can meet my problem. If Counsel will stipulate that there were 11 employees in the unit described in the consent agreement, or in the complaint, and that the names of those people are as shown on the Exhibit No. 8, excluding therefrom the name of J. E. Carroll, then I will know what I will do.

Mr. Stirling: I did say there were 11. Of course, we did [181] consider Carroll as an employee temporarily absent because of his illness.

Mr. Boyd: You assumed that it was temporary, and it proved to be continued.

Mr. Stirling: Yes. I suppose that, had an election been held at that time, Carroll would not have been available to vote. I'm just kind of in a quandary about that. Well, I think I've already stipulated there were 11 employees in the unit.

Trial Examiner: You stipulated, but, of course, if you're trying to qualify it, it isn't a stipulation.

Mr. Stirling: No. [182]

* * *

HUBERT E. CURTIS

a witness having been recalled by and on behalf of the General Counsel, and being previously sworn, was examined and testified further as follows:

Direct Examination
(Continued)

By Mr. Boyd:

Q. Since you left the stand yesterday, have I talked to you at all, Mr. Curtis? A. No, sir.

Q. Will you direct your recollection to your conversation that [186] you testified to yesterday with Mr. Thrash, when you went back on the evening of January 11th and talked with him, and explained to him that you had not been planted in the plant to inform the union? Do you recall your testimony yesterday? A. Yes.

(Testimony of Hubert E. Curtis.)

Q. Now, will you relate, please, in full what it was that Mr. Thrash said to you at that time? This may be repetitive. Let me restate it on this one point, and I will lead the witness to this extent: Was any mention made of a franchise?

A. Yes, there was.

Q. Now, what was his statement with respect to franchise?

A. As near as I can remember, it was along in regard to the rumor I previously heard in the shop. What he told me, I mean as near as I can recall, that rather than to have a union recognized shop, they would give away a franchise. I don't know—I don't recall his exact words, but that's a summary of it.

Q. Do you remember what it was that had been said just before that that led to him making this remark? A. No, I don't.

Q. Was there anything that you had said that led to making that remark?

A. Possibly, but I don't recall what it was.

Q. Do you recall him saying whether you were at liberty to repeat that remark?

A. Yes, he said at first not to mention it, just between he [187] and I. Then later on, I mean, he retracted and said that I could pass it on if I wished.

Q. You could mention it?

A. I could mention it. It wouldn't make any difference. [188]

* * *

FRANK S. PARKER

a witness called by and on behalf of the Respondent, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Stirling:

Q. Mr. Parker, what if anything do you know of the status of J. E. Carroll of the Central Point branch?

A. What do I know of the status of J. E. Carroll? Of course, he is an employee at the present time—Carroll or Curtis?

Q. Carroll.

Mr. Boyd: The man who was ill. [197]

Q. (By Mr. Stirling): The man who has been ill. A. Oh, the man who was ill?

Q. That we had the discussion about.

A. Oh, he was on the payroll—I had the date. I got that information this morning, but he was on the payroll of the Howard-Cooper Corporation—I believe the last day he worked was October 16th, or was it the 10th? The 16th or——

Trial Examiner: The 10th or 16th?

Q. (By Mr. Stirling): Of what year?

A. '55.

Q. Yes, and then how was he carried thereafter?

A. He was carried on the employee payroll. Of course, there was no time cards turned in for him, but he was carried as an employee until—I've forgotten the date—March the 16th—is that right?

(Testimony of Frank S. Parker.)

Trial Examiner: Do you have some payroll records here?

The Witness: Pardon, sir?

Trial Examiner: Do you have some payroll records here?

Q. (By Mr. Stirling): Do you have anything you can refresh your memory with?

A. Well, that note. I think you have that note that I wrote down the information on this morning. It has the exact date on it.

Mr. Stirling: I wonder if I might be permitted to hand this to Mr. Parker in order that he might refresh his memory. [198] It is a document which he himself made some notes on.

Mr. Boyd: I'm familiar with it.

Trial Examiner: Yes.

The Witness: His last pay check was October 16th, and he was severed from the payroll on April the 4th, 1956. This communication would be all right to——

Q. (By Mr. Stirling): Well, what then was his status with respect to whether or not he was expected to come back to work during that period of time?

A. He was carried on the payroll. Of course, no time cards were turned in for him because he was not working, but he was carried on the payroll until April the 4th, '56, and this particular communication regards accident and sickness claim form, which is dated January 13th, '56, and in this

(Testimony of Frank S. Parker.)

communication, which was forwarded from Portland, Mr. Carroll stated that he would return around March the 1st. However, the doctor at a later date said that he could not return to work.

Trial Examiner: Mr. Parker is referring to some document that he has in his hand.

The Witness: Yes.

Q. (By Mr. Stirling): And during that period of time from October 16th to April 4th, did the company records carry him as an employee continually, continue to carry him as an employee?

A. Yes.

Q. Where are those company records kept, Mr. Parker? [199]

A. In Portland, Oregon.

Q. Do you know approximately when the company was informed that he would not be able to come back to work?

A. On the—right around the 1st of April.

Q. Of '56? A. Yes.

Q. Do you know how that information came to the company?

A. The information was relayed to the bookkeeping department by the shop foreman, Mr. Thrash.

Q. And do you know what the reason for that was, I mean, why Mr. Carroll was not going to return?

A. Under doctor's orders not to return to work.

Q. Now, with respect to your records at Portland then, what would be the effect on your records at Portland? What would they do with his record

(Testimony of Frank S. Parker.)

at Portland when you received this word in April that he would not be able to come back to work?

A. Well, his card would be withdrawn from the employees group at Central Point.

Q. And he would no longer be considered an employee? A. No.

Q. Now, with respect to the testimony of Mr. Curtis regarding the franchise, does the Howard-Cooper Company have franchises, Howard-Cooper Corporation? A. Have franchises?

Q. Yes. [200]

A. Well, I suppose you would consider it as such, a franchise. We have a contract with the International Harvester Company.

Q. And what area does that cover?

A. That covers the western half of Washington, the western half of Oregon, and seven counties in northern California.

Q. Now, was it ever within the consideration of the corporation that you might know as Vice President of the corporation to give up a contract right or a franchise with International Harvester in Central Point?

A. Well, we never considered giving up the franchise at Central Point at any time. In fact, the contract with the International Harvester Company carries a six months' cancelation clause, which would be necessary. If we gave up Central Point, why, we'd have to change our entire contract at the acquiesce of the International Harvester Company.

(Testimony of Frank S. Parker.)

Q. In other words, your franchise is a contract covering the entire area, not just branch by branch?

A. The contract as originally written covers the various counties in the western half of Washington, the various counties in the western half of Oregon, and, of course, the corporation in California is a separate corporation, and it covers the seven counties in northern California.

Q. Did you or did anyone in management with your knowledge ever convey to anybody at Central Point that there was a possibility of any franchise covering Central Point being withdrawn? [201]

A. No.

Q. Did you ever talk to Thrash about anything like that? A. No.

Mr. Boyd: Did the witness answer?

The Witness: Yes.

Mr. Boyd: What was your answer?

The Witness: No.

Mr. Boyd: Oh, you had not done so?

The Witness: Talked with Thrash concerning the franchise? Is that your question?

Mr. Boyd: Had any——

Trial Examiner: He answered that he had not had any such talk with Thrash.

Mr. Boyd: Anything like that, was the question put to you?

The Witness: Will you put the question again?

Mr. Stirling: I'll have to ask him to read it.

(Question read.)

(Testimony of Frank S. Parker.)

Q. (By Mr. Stirling): Now, I don't know whether you were asked on examination by the General Counsel's representative of whether you had seen this paper that's been referred to as a petition and designated General Counsel's Exhibit 7. Have you seen that document before? A. Yes.

Q. Now, do you recall when you first saw that document, Mr. Parker? [202]

A. Why, it came in the mail, and I would say it came in the mail—I don't know what date it was mailed.

Q. Maybe I should ask you: Where did you first see it?

A. In Portland, Oregon, and I would say that I saw it on January the 16th.

Q. Had you ever seen it before that time?

A. No.

Mr. Stirling: Will you mark this, please?

(Thereupon, the document above referred to was marked Respondent's Exhibit No. 1 for identification.)

Q. (By Mr. Stirling): Mr. Parker, I show you Respondent's Exhibit 1 and ask you if you can identify that? A. Yes.

Q. What is that?

A. This is a notification to all of our Oregon branches to the effect that on January 3rd, 1956, the charge-out rates for the Howard-Cooper shops in Portland, Albany, Eugene, Roseburg, Central

(Testimony of Frank S. Parker.)

Point and Coquille will be in accordance with the schedule listed below, and this is a——

Q. What do you mean "charge-out rates"?

A. The charge-out rates are the rates which we charge our customers for service.

Q. Now, is that an increase or a decrease on what you were charging before?

A. That is an increase on our rates. On our bench and floor [203] mechanics, the charge-out rate previous to this time was $4.50, and it was raised to $5.

Q. Now, what relation, if any, does that have to wage rates?

A. This is in anticipation of wage rates.

Q. And when was that to be effective?

A. This was to be effective January the 3rd.

Q. When was it distributed to the branch houses?

A. It was distributed to the branch houses—it was mailed on January 3rd, and they received it in the regular mail.

Q. What relationship, if any, did it have to any increase in the wage rates?

Mr. Boyd: Object.

Trial Examiner: I suppose the purpose of this is to establish a decision was made on wage rates, the increase, prior to the time the company knew that the union was in the picture. It may be somewhat remote here, but he may answer. You may answer.

(Testimony of Frank S. Parker.)

The Witness: I would like to have the question repeated again.

Mr. Stirling: Will you read it, please?

(Question read.)

The Witness: This increase was decided upon because we knew we were going to increase the hourly pay to the shop employees.

Q. (By Mr. Stirling): In all the branches? [204]

A. In all the Oregon branches.

Mr. Stirling: I would like to offer Respondent's Exhibit No. 1 into evidence, if Mr. Boyd has no objection. Unfortunately, that's the only copy I have. We can have other copies made.

Mr. Boyd: Frankly, I think it has no probative value. That was the purpose of my objection. I objected to the oral testimony. Just for the record, I'll object to the receipt of the document. It circumstantially corroborates what the witness has testified to, I recognize that.

Trial Examiner: It's received with the understanding that you will furnish the Reporter with a duplicate within five days of the close of the hearing.

Mr. Stirling: All right, Mr. Spencer, I will.

(The document heretofore marked Respondent's Exhibit No. 1 for identification, was received in evidence.)

(Testimony of Frank S. Parker.)

RESPONDENT'S EXHIBIT No. 1

1/3/56

Oregon Branch HCC Shop Charges

Effective January 3rd, 1956, the charge-out rates for HCC Shops in Portland, Albany, Eugene, Roseburg, Central Point and Coquille will be in accordance with the schedule listed below. Please acknowledge receipt of this information.

General Line Shop	Straight Time	Overtime
Bench & Floor Mechanics	$ 5.00	$ 7.00
Machine Work; Cutting Torch & Welding; Pump Room; Steam Cleaning	6.50	9.00
Field Work, outside of shop, same rates as above, plus mileage, per mile. Pickup Truck or car, plus expenses	.10	
1½-ton truck	.20	
Crane Work, including operator	10.00	12.00

F. R. COOPER,

By /s/ S. J. ROGERS.

Replaces Page dated 10/24/55.

(Reprint of Page Dated 1/3/56.)

Received in evidence June 26, 1956.

Q. (By Mr. Stirling): Mr. Parker, there seems to be some question as to whether or not you came directly from Eugene to Central Point on January 10th. You stated in your direct testimony that you were, I believe, in Albany and Eugene that day, and that you went on to Klamath Falls, and then

(Testimony of Frank S. Parker.)
that you came from Klamath Falls to Central Point on the night of the 10th. Was that what you stated?

A. In the afternoon of the 10th, we came across —we came across during daylight hours, to get across the mountains. [205]

Q. Well, are you certain that you did go to Klamath Falls? A. Yes.

Q. And how are you certain of that?

A. Well, I had an appointment with Mr. Frank Carr, the Purchasing Agent of the Weyerhaeuser Timber Company. Their offices are located in Klamath Falls.

Q. And was Mr. Thomas with you?

A. Yes.

Q. And then I take it your itinerary was from Eugene to Klamath Falls, and then to Central Point? A. That's correct.

Q. On the 10th? A. Yes.

Mr. Stirling: I believe that's all I have.

Trial Examiner: Do you have anything, Mr. Boyd?

Mr. Boyd: Yes; I do.

Cross-Examination

By Mr. Boyd:

Q. Was your business with the Weyerhaeuser representative the only business you transacted in Klamath Falls? A. That's correct.

Q. Now, travel in daylight hours in January——

A. Yes.

(Testimony of Frank S. Parker.)

Q. ——would have brought you—and to have arrived here in daylight hours, would have brought you in here around 4:00 o'clock in the [206] afternoon?

A. I wouldn't be specific about the exact time. We got across the mountains during daylight hours due to the fact that there was a lot of snow and ice on the—I think it's called Green Pass. I don't know if it was 4:00 o'clock or not. I don't think it was quite that early.

Q. On another subject, Mr. Parker: Do I understand it to be your testimony that you did not talk with Mr. Thrash concerning any statement he made to the effect the company might give up its operations in Central Point because of this union activity? A. That is correct.

Q. You did not talk with Mr. Thrash about that?

A. No, sir.

Q. Either in advance of any statement made by him, or after learning that he had made such statements?

A. I learned that he—I had a rumor come to me that he had made some statements, which he shouldn't make. Now, I don't know if it was about the franchise or not, and, when I got back in Portland the following week, I called him on the phone and I told him if he was making any statements whatsoever to the employees, cut it out.

Q. But you had heard that he had been making some?

(Testimony of Frank S. Parker.)

A. I had rumors. I don't know where I got the information.

Q. That's the significance of the statement in your own affidavit, isn't it? A. Pardon? [207]

Q. That's the significance of the statement in your own affidavit that you previously made, which is received in evidence here?

A. What do you mean, the significance of it?

Q. Of what you are now testifying to is the significance of this part of your former affidavit:

"I didn't tell any employee or anyone else that the Company would close its Central Point establishment or its shop there if it went union nor did I make any statements of that sort. I heard that Hi Thrash, our shop foreman at Central Point, Oregon, had made some such statement."

A. Yes.

Q. "I called him about it and he admitted that he had discussed it with some of the men when they asked him about it. I told him not to make any such statements as he was just getting us into trouble with them." A. That's right.

Q. Now, with respect to this man, Carroll, yesterday, when I asked you about him, you knew nothing of him. The information you've given this morning is that which you have secured by talking with your local plant officials and talking with your office in Portland? A. That's correct.

Q. And for the Trial Examiner's understanding, the control pay records are kept in your Portland office? [208] A. That's correct.

(Testimony of Frank S. Parker.)

Q. And the pay checks are issued from the Portland office? A. That's right.

Q. The local office is merely a conduit for sending to the Portland office the report that develops from week to week, is that correct? A. Yes.

Q. And it's my understanding that you regularly make out a separate time report for each individual—each individual employee separately at the branch office, and in those separate reports for each individual, that is a document submitted to the Portland office? A. Right.

Q. Tell me this: Do you know whether at the time of Mr. Carroll's heart attack last October the record sent in at that time showed him simply on sick leave or terminated?

A. Well, I wouldn't know that. I would say offhand he was put on sick leave. I wouldn't know that.

Q. What in practice—are you familiar with the payroll practices of the company?

A. Not too—no, not too generally for the simple reason it's handled by the bookkeeping department.

Q. Well, is it within your knowledge though whether there is an established practice about carrying people on sick leave when someone has some serious disabling illness? Does the [209] company regularly carry them on sick leave?

A. Yes. I would say so, yes.

Q. Well, if that be true, did Carroll draw Christmas pay, vacation pay?

A. I couldn't tell you that because I didn't in-

(Testimony of Frank S. Parker.)

quire about that this morning. I wouldn't know that. I'd have to go to the records.

Q. Are people who are carried on sick leave eligible to draw their holiday pay, according to your company's practices?

A. I don't know for sure about that. I'd have to go to the records on it.

Q. In other words, this is not matters within your personal knowledge?

A. No; it is not a matter within my personal knowledge, because, as I said previously, it's handled by the bookkeeping department, and they have all the records and all of the agreements that are necessary.

Q. Now, the document that you then rely on in your testimony is the memorandum that you had in hand that you were examining when you testified?

A. Yes.

Mr. Boyd: Maybe Counsel has that. I'm not impeaching the validity of the document. I want to inquire into the fact.

Q. (By Mr. Boyd): The document you had in hand is a carbon copy of an inter-office communication from your office manager [210] at the Central Point office to someone in your bookkeeping department? A. Yes.

Q. In your Portland office? A. Portland.

Q. And it bore the date of January 13th, 1956?

A. I believe that's correct, yes.

Q. The document appears to relate to some insurance report in part? A. Yes.

(Testimony of Frank S. Parker.)

Q. Are you sufficiently familiar with the insurance coverage of your employees to be able to testify from your own knowledge of whether Carroll at that time was being carried under an insurance benefit? A. Yes; he was.

Q. On a contract for which the company was making any payments? A. Yes.

Q. He was? A. I am quite sure, yes.

Q. Well, now, if Carroll went off work in October because of illness, was the company obliged to make any payments for Carroll on the sickness program after he went off work, after he went off your payroll?

A. I don't know if we're obliged to do it or not.

Q. Then you don't know for sure that the company was [211] contributing any for the insurance for him then?

A. No. I assume that they were. He was carried until—I believe it was 13 weeks. I'm not sure of that, but I think it was 13 weeks.

Q. It was insurance covering him for 13 weeks?

A. I think so.

Q. Now, then, in practice, does the company, your company, make out and provide to the insurer a sickness report that entitles—that is required, to entitle the employee to draw his insurance benefits?

A. I don't know as to that.

Q. Well, are you—is it the sum of your testimony that he was on your records in January because at that time he was still the beneficiary of some insurance that he had contributed to and the

(Testimony of Frank S. Parker.)

company had contributed to that covered him at the time of his disabling illness in October?

A. That is my belief, yes.

Q. That that was the reason for him being carried on your records at that time?

A. Oh, I don't know if that's the reason for him being carried on the records. I think we carried him on our records because we anticipated that he would return to work.

Q. I'm curious about the memorandum. The first paragraph, which I will read, is:

"Attached please find accident and sickness claim form [212] for the above subject employee. Please fill out employer statement portion of this form." That concludes the first paragraph, and the "above subject employee" has reference to a heading, "James Carroll, insurance form," this being a memorandum from G. V. Mullen to Alice Ryer, addressed to her at Portland.

Now, the practice of processing the insurance forms is not a matter within the scope of your personal knowledge? A. No.

Q. Then the second paragraph: "Mr. Carroll stated today that it would be around the 1st of March when he would be able to return to work." That's the end of the paragraph.

This being dated January 13th, do you know the circumstance under which he was asked whether he would return to work? A. No; I don't know.

Q. So, the basis of your saying in testimony

(Testimony of Frank S. Parker.)

here now that Carroll was on your payroll is this information here?

A. And the information I received from Portland this morning regarding him.

Q. That they had records in Portland——

A. Yes.

Q. ——that corresponded with this——

A. Yes.

Q. ——with this information, is that it?

A. Right. [213]

Q. And they by telephone reported to you this morning? A. Yes.

Q. That they had discontinued carrying any record of him as an employee on April 4th of 1956?

A. April 4th or 14th?

Q. You have testified April 4th and your notation shows April 4th.

A. That is correct, then, sir.

Q. And you do not know the circumstance under which—or the information under which—which prompted them to discontinue—— A. No.

Q. ——such records as they had kept?

A. I didn't even know he had a heart attack. See, we have about 300 employees, and I don't know all of them.

Q. Can you state, Mr. Parker, whether a person who has a disabling injury or illness, covered by your group insurance, if he fails to return to work within the period of protection, insurance protection, if his disablement keeps him off work beyond the period of protection, 13 weeks, is he, as a busi-

(Testimony of Frank S. Parker.)

ness practice of your company, continued on the payroll?

A. I believe so. That's a technical question. I wouldn't want to be——

Q. It's a matter you don't know the answer to, is that it? A. That's correct.

Q. You don't know your company's [214] practice?

A. I don't know the practice on that particular phase, but I believe so.

Q. It is a fact, isn't it, Mr. Curtis was employed to fill the vacancy caused by Mr. Carroll's disabling illness last October, or do you know that?

A. I don't know that.

Q. You don't know that?

A. No; I don't know that because I don't know when Mr. Curtis was hired. [215]

* * *

Received July 31, 1956.

In the United States Court of Appeals
for the Ninth Circuit

No. 15937

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HOWARD-COOPER CORPORATION,

Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Howard-Cooper Corporation, Portland, Oregon, its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as "Howard-Cooper Corporation and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO," Case No. 36-CA-724.

In support of this petition the Board respectfully shows:

(1) Respondent is an Oregon corporation engaged in business in the State of Oregon, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, The Board on February 5, 1957, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, and pursuant to Rule 34(7)(a) of this court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, and exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of

the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, agents, successors and assigns, to comply therewith.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel,
National Labor Relations Board.

Dated at Washington, D. C. this 14th day of March, 1958.

[Endorsed]: Filed March 18, 1958.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENT TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Comes now the Respondent herein, Howard-Cooper Corporation, and for answer to the petition for the enforcement of an order of the National Labor Relations Board, issued by the National Labor Relations Board on February 5, 1957, in connection with the proceedings known as "Howard-Cooper Corporation and International Union,

United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO," Case No. 36-CA-724, admits, denies and alleges as follows:

1. Respondent admits that this Court has jurisdiction of this matter.

2. Respondent admits that proceedings were had before the Board in this matter, but denies that the findings of fact and conclusions of law of the Trial Examiner or the Board were justified.

And for a Further and Separate Answer and Defense, Respondent alleges as follows:

1. That the Board erred in finding that the Respondent had engaged and was engaging in certain unfair labor practices, to wit, a refusal to bargain with the Union in violation of Section 8(a)(5) of the Act.

2. That the Board erred in finding that the Union represented a majority of the employees of the Respondent in the appropriate unit.

Wherefore, the Respondent, having fully answered the petition herein, prays that the same be dismissed.

/s/ J. P. STIRLING,
Attorney for Respondent.

[Endorsed]: Filed April 1, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding petitioner, National Labor Relations Board, will rely upon the following points:

1. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent interfered with, restrained, and coerced its employees in violation of Section 8 (a) (1) of the Act.

2. Substantial evidence on the record considered as a whole supports the Board's conclusion that respondent refused to bargain with the Union in violation of Section 8 (a) (5) and (1) of the Act.

NATIONAL LABOR RELATIONS BOARD,

By /s/ MARCEL MALLET-PREVOST,
Assistant General Counsel.

Dated at Washington, D. C., this 22nd day of April, 1958.

[Endorsed]: Filed April 26, 1958.

[Title of Court of Appeals and Cause.]

CERTIFIED LIST OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section

102.84, Rules and Regulations of the National Labor Relations Board, Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled "Howard-Cooper Corporation and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL-CIO." Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

General Counsel's Exhibits Nos.:

1-A through 1-F.

2 through 16.

Respondent Company's Exhibit No. 1.

Stenographic transcript of testimony taken before Trial Examiner William E. Spencer on June 25 and 26, 1956.

Copy of Trial Examiner Spencer's Intermediate Report and Recommended Order issued July 24, 1956.

Copy of Erratum correcting the name of the labor organization involved in subject case issued on August 3, 1956.

Respondent's exceptions to the Intermediate Report received August 16, 1956.

Copy of Decision and Order issued by the National Labor Relations Board on February 5, 1957.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 22nd day of April, 1958.

[Seal] NATIONAL LABOR RELATIONS BOARD,

By /s/ OGDEN W. FIELDS,
Acting Executive Secretary.

[Endorsed]: Filed April 26, 1958.

[Endorsed]: No. 15937. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Howard-Cooper Corporation, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed April 30, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15937

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOWARD-COOPER CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JEROME D. FENTON,
General Counsel,
THOMAS J. McDERMOTT,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
ARNOLD ORDMAN,
Attorney,
National Labor Relations Board.

FILED
JUL 15 1958
PAUL P. O'BRIEN, CLERK

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AUTHORITIES CITED

Cases:

N. L. R. B. v. *Idaho Egg Producers, Inc.*, 229 F. 2d 821 (C. A. 9)	11, 13, 14
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In the United States Court of Appeals for the Ninth Circuit

No. 15937

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOWARD-COOPER CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board to enforce an order issued against respondent on February 5, 1957 and officially reported at 117 NLRB 287 (R. 31–36, 7–29).[1] This Court has jurisdiction under Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.,* Appendix, *infra,* pp. 16–18), the unfair labor practices having occurred in respondent's plant in Central Point, Oregon, one of several plants in Oregon and Washington where respondent, admittedly in interstate commerce, sells and services industrial and farm machinery (R. 8–9; 3–4, 39–40).

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[1] References designated "R." are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

STATEMENT OF THE CASE

In the instant case the Board found that respondent violated Section 8 (a) (1) of the Act by offering the employees at its Central Point plant material inducements to repudiate union representation, by fostering an anti-union petition which was circulated among these employees, and by threatening a shutdown in the event of unionization. The Board also found that respondent had engaged in a refusal to bargain, in violation of Section 8 (a) (5) and (1) of the Act. Respondent's principal defense on this phase of the case was that the Union (International Union, UAW, AFL–CIO) had not been designated as bargaining representative by a majority of the 12 employees comprising the appropriate bargaining unit. The Board's findings and the supporting evidence relating to the foregoing matters are here briefly summarized:

I. The Board's findings of fact

A. The Union's organizational campaign and respondent's counter-measures

On or about November 7, 1955, Harry Whiteside, a Union representative, distributed organizational leaflets, with Union authorization cards attached, to the employees at respondent's Central Point plant (R. 10; 41–44). During the ensuing week or ten days a number of the employees, comprising what the parties agreed and the Board found to constitute an appropriate bargaining unit, mailed or delivered signed authorization cards to Whiteside (R. 10, 20; 42).[2]

[2] The Board, like the Trial Examiner, found that seven, or a majority, of the 12 employees comprising the appropriate unit had authorized the Union to represent them (R. 32–34). Re-

At a Union meeting held on November 16, however, the employees present requested that the Union delay notifying respondent of its designation as bargaining representative until after the Christmas and New Year holidays as they did not want to risk forfeiting certain benefits which the Company might extend during these holidays (R. 10; 42, 44, 121, 131–132, 162–163). The Union honored this request and withheld any notification to respondent until January 4 (R. 10; 46–48). On that date Whiteside wrote to respondent at its Central Point plant and requested recognition and negotiations for a contract (R. 10–11; 47–49). Respondent made no reply to the letter (R. 11; 49). Accordingly, on January 10 Whiteside filed a petition with the Regional Office of the Board asking for certification of the Union as bargaining representative (R. 11; 49–54).

On January 11, Parker, respondent's vice-president and general manager of its branch operations, and Thomas, respondent's sales manager, who were making a tour of respondent's branch plants, were at the Central Point plant (R. 11; 82, 87, 96–97, 100). Parker was aware at this time of the Union's request for recognition and bargaining (R. 11; 83–84). Thrash, shop foreman at Central Point, summoned the employees to his office where they met with Parker, Thomas, Thrash, and Heaton, manager of the Central Point plant (R. 11; 132–133). Parker told the assembled employees he understood there was trouble and dissension in the plant; that unions tended

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spondent, as already indicated, challenges this finding. See, *infra*, 12.

to lead to hard feelings, strikes, physical violence, and economic hardship; that while unions were all right in their proper place, respondent had few labor difficulties, its doors were always open for complaints and he, Parker, did not know why the employees had authorized the union to represent them (R. 11–12; 101–102, 134, 157).

Following these introductory remarks, Parker invited the employees to voice any grievances they had (R. 12; 102). After some hesitation, one employee raised the question of a "coffee break" and stated his understanding that this was allowed at other branch plants (R. 12; 103). Parker suggested that the employees discuss it with the branch manager and that the latter's decision would be controlling (*ibid.*). A ten-minute coffee break was instituted immediately after Parker's visit (R. 12; 160, 189). Other problems were also raised relating to such matters as the furnishing and laundering of coveralls, health and accident insurance, and maternity benefits (R. 12; 103–108, 135–136). So far as appears, no action was taken relative to these matters. But when Employee Hennegar complained that an employee had to work six months before receiving paid holidays, Parker announced that he, Parker, would "take care of that right there" (R. 12–13; 188). Parker also announced during the meeting that respondent had earlier decided to grant a ten-cent hourly increase to employees at all its branch plants, but questioned whether the raise could be granted at Central Point with the Union "in the picture" (R. 13; 105). Parker, however, did not announce the impending wage increase

at any other branch plant, although he was touring all the Oregon branch offices during this period (R. 106–107).

Immediately following Parker's visit, Foreman Thrash held individual interviews with some of the employees (R. 13; 140–141, 175–177, 208). In the course of his interview with Employee Hennegar, Thrash pointed out that on a previous occasion the plant was closed down because the employees had voted for union representation (R. 13; 193).

In addition, on the day following Parker's visit, a petition, addressed to the Regional Office of the Board, was posted in the plant (R. 14; 143, 74). The petition, copies of which were sent to Union representative Whiteside and respondent, read as follows (R. 74):

> The undersigned employees of Howard Cooper Corp., Central Point branch respectfully petition that no action be taken regarding union organization and representation for this shop. Said employees have met with company officials and reached an agreement regarding wage conditions and wages and do not desire to make a union affiliation at this time.

The petition was the result of conferences between Foreman Thrash and Employee Donald Squire and Charles A. Brown, Jr. (R. 14; 165, 177–179). Responsive to Parker's earlier suggestion, confirmed by Thrash, that the effectuation of the proposed wage increase at the Central Point plant was doubtful because of the Union, Squire, Brown, and Thrash agreed that a petition would be the proper procedure to follow to insure the obtaining of the wage increase

(R. 14–16; 165–166, 177–180). Brown had the petition typed in Thrash's office, obtained the address of the Board's Regional Office from respondent's office manager, and on the afternoon of January 12 posted the petition next to the time clock (R. 15; 178–183).

Only two employees, Squire and McCoy, neither of whom had signed Union authorization cards, signed the petition on January 12 (R. 16; 143–144). Employee Bishop, who returned to the plant from a field assignment late that afternoon, saw the petition and that evening met with Union Representative Whiteside to ask what the employees who had signed Union authorization cards should do with respect to the petition (R. 16; 142, 144–145). Whiteside replied that in his view—he had not seen the text of the petition—the purpose of the document was to discover the identity of the Union adherents and advised that all these employees should sign the petition (R. 16; 145, 57–58). Bishop passed this advice on to the employees who had signed Union authorization cards and on the following day seven additional signatures were added to the petition, making a total of nine (R. 16; 145–146, 162).

In his meeting with Bishop, Whiteside also told Bishop that the Union would write respondent agreeing to the wage increase (R. 16; 57). The letter was written under date of January 14, and respondent thereupon effectuated the wage increase with respect to the Central Point plant along with the other branch plants, making it retroactive to January 9 (R. 16; 58–61).

B. The Union's majority status

As already indicated, the parties stipulated and the Board found that all employees employed by respondent at the Central Point plant to service, repair and maintain tractors and heavy machinery, with certain inclusions and exclusions not material here, constituted a unit appropriate for purposes of collective bargaining (R. 20; 40). Of the twelve employees comprising the appropriate unit, six testified that on or before the Union meeting of November 16, 1955, they signed cards authorizing the Union to represent them (R. 21, 31; 121, 151, 173–174, 184–185, 197, 204–205).[3]

A seventh employee, Richard Hachenberg, was serving on National Guard duty at the time of the hearing and did not testify. However, evidence was adduced that, when Employee Bishop called at Hachenberg's home on the evening of November 16 to offer Hachenberg a ride to the Union meeting, Hachenberg gave Bishop a signed Union authorization card for transmittal to Whiteside that evening, and that Bishop did deliver the card in question to Whiteside that evening (R. 22, 33; 45, 127). Later that

[3] Two of the six employees testified that, when they originally signed the authorization cards, they understood that the cards were merely for the purpose of holding a union meeting (R. 195–196, 202–203). The two employees admitted, however, that at the Union meeting of November 16 which they attended, they understood that the cards had the effect of designating the Union as their bargaining representative (*ibid.*). They did nothing then or thereafter prior to the petition of January 12, which could reasonably be construed as revoking or modifying their assent to representation by the Union (R. 22).

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evening Hachenberg appeared at the Union meeting (R. 22, 33; 131).[4]

On January 13, Bishop informed Hachenberg, as directed by Union Representative Whiteside, that Union adherents should sign the anti-Union petition of January 12 in order to protect themselves (R. 145–146). Hachenberg, along with the six other adherents, affixed his signature to the petition as already indicated, p. 6.

On or about January 16, the employees gave Whiteside a detailed report concerning Parker's visit to the plant on January 11 and the benefits which had been granted as a result of that visit (R. 17; 64). Whiteside thereupon declined to enter into an agreement for a consent election upon its petition for certification and on January 23 filed the unfair labor practice charges giving rise to the instant proceeding (R. 17; 75).

II. The Board's conclusions and order

Upon the foregoing facts the Board, like the Trial Examiner, found that respondent, upon learning of the Union's claim for recognition and bargaining rights, interfered with, restrained, and coerced its em-

[4] The testimony as to the attendance at the meeting was somewhat in conflict. Whiteside testified that seven employees were present, namely, Bishop, Billups, Brown, Long, Hachenberg, Hennegar, and Curtis (R. 46). These were the seven whom the Board found had designated the Union as their bargaining representative. Bishop, who likewise testified as to the November 16 meeting, agreed that seven employees were present but in naming the seven included the name of McCoy and omitted the name of Hennegar (R. 131). McCoy, as already noted, p. 6, was not a Union adherent. Hennegar, on the other hand, testified that he had signed and mailed in a union authorization card (R. 184).

ployees in violation of Section 8 (a) (1) of the Act by offering them inducements, such as a coffee break and a wage increase, as a reward for repudiating union representation; by participating in and fostering the anti-union petition of January 12, 1956; and by Foreman Thrash's veiled threat of plant closure in the event of unionization (R. 24, 32). The Board found further, likewise in accord with the Trial Examiner, that on January 4, when the Union requested recognition, and thereafter, the Union had been designated by a majority of the employees in an appropriate unit, that respondent neither entertained nor expressed any good faith doubt as to the Union's majority status, but with full knowledge of the Union's claim engaged on January 11 and thereafter in a program designed to destroy the Union's majority and to supplant collective bargaining with individual bargaining, in violation of Section 8 (a) (5) and (1) of the Act (R. 17–23, 32–34).

Accordingly, the Board ordered respondent to cease and desist from engaging in the unfair labor practices found and from like or related unfair labor practices. Affirmatively, the Board ordered respondent to bargain collectively with the Union upon request and to post appropriate notices (R. 34–36).

ARGUMENT

I. Substantial evidence on the record considered as a whole supports the Board's finding that respondent unlawfully interfered with the organizational rights of its employees in violation of Section 8 (a) (1) of the Act

Frank S. Parker, respondent's vice-president and general manager of its branch operations, was ad-

mittedly aware when he addressed the Central Point employees on January 11, 1956, that the Union claimed majority status, recognition, and bargaining rights (*supra*, p. 3). Parker did not challenge the Union's claim to majority status. Instead, while professing neutrality toward union organization in general, Parker told the assembled employees that there was dissension in the plant, that unionization gave rise to a train of evils, and that since respondent's doors were always open to the receipt of grievances, the employees had no need of a union. Parker underscored these remarks by asking the employees at the meeting individually to voice their complaints, and in response to such complaints forthwith instituted a coffee break and undertook to "take care of [a paid holiday complaint] right there." Even more significantly, Parker utilized this occasion to inform the employees that respondent had earlier determined upon a wage increase applicable to all plants, but that institution of the wage increase at Central Point was doubtful because of the Union. The Board was plainly warranted in concluding that Parker's conduct was designed to frustrate the organizational efforts of the employees, to point out the advantages of foregoing union representation, and to emphasize that unionization was endangering a proposed wage increase. Extended citation of authority to establish the unlawful character of Parker's conduct, even considered apart from the coercive character of Foreman Thrash's observation that a previous organizational effort had resulted in plant closure, is patently un-

necessary. See *N. L. R. B.* v. *Idaho Egg Producers,* 229 F. 2d 821 (C. A. 9).

In the setting of Parker's speech and the ensuing interviews which Foreman Thrash conducted, and particularly in the context of a proposed wage increase which, according to respondent, was rendered doubtful because of the Union,[5] it was readily forseeable that the employees would be receptive to a suggestion to repudiate the Union. Such a suggestion arose out of conferences between Foreman Thrash and two employees, and a petition repudiating the Union was prepared with the use of Company facilities and was posted next to the Company's time clock. Even then only two non-union adherents signed the petition and the remaining seven signers—all Union adherents—affixed their sigatures only after being so advised by the Union (*supra,* p. 6). Respondent's participation in and fostering of the anti-union petition was, like its antecedent conduct, an obvious effort to interfere with the organizational efforts of its employees and to destroy the Union's majority status. *N. L. R. B.* v. *Parma Water Lifter Co.,* 211 F. 2d 258, 261–262 (C. A. 9), certiorari denied, 348 U. S. 829.

[5] The sincerity of respondent's protestations regarding the proposed wage increase is doubtful on two scores. In the first place, Parker admittedly made no mention of the proposed wage increase at the other Oregon plants which he visited on the same tour. Moreover, respondent made no effort to consult with, or even inform, the Union of its proposal although, as later events revealed, the Union was wholly amenable to the granting of a wage increase.

II. Substantial evidence on the record considered as a whole supports the Board's finding that respondent refused to bargain with the Union, in violation of Section 8 (a) (5) of the Act

The foregoing facts, in large part undisputed, establish not only respondent's unlawful interference with the rights guaranteed employees by Section 7 to organize and bargain collectively through representatives of their own choosing; they also establish, as the Board and Trial Examiner found (R. 17–23, 32–34), respondent's unlawful refusal to bargain. As already observed, p. 3, respondent admits that at the time of Parker's speech to the assembled employees on January 11 and Foreman Thrash's interviews immediately thereafter, all culminating in the anti-Union petition of January 12, respondent was aware of the Union's claim to exclusive recognition. Respondent, however, expressed no doubt as to the validity of the Union's claim but rather launched on a course of conduct designed to destroy the Union's majority status.

Respondent does not seriously controvert the findings relating to its conduct. It does assert, however, that the record fails to support the Board's finding that the Union represented a majority of the employees comprising the appropriate unit. Accordingly, it argues that no obligation to bargain existed and a refusal to bargain allegation cannot be sustained.

As the record shows (*supra,* p. 7), six of the 12 employees comprising the appropriate unit testified

that they had authorized the Union to represent them.[6] Respondent places its principal reliance therefore on an alleged insufficiency of proof that Richard Hachenberg, the seventh employee, had likewise designated the Union as his choice for bargaining representative. In this connection, uncontroverted evidence (*supra*, pp. 7–8) establishes that Hachenberg on the evening of November 16 handed Bishop a Union authorization card on which Hachenberg had designated the Union as his bargaining representative. Pursuant to Hachenberg's direction, Bishop delivered the signed authorization card to Whiteside at the Union meeting held that night. Uncontroverted evidence establishes further that Hachenberg later put in his appearance at the Union meeting. Finally, uncontroverted evidence establishes that on the morning of January 13, in answer to Hachenberg's inquiry, Bishop transmitted Whiteside's advice that all Union adherents should for their own protection sign the antiunion petition posted the previous day and that Hachenberg, together with the other six Union adherents, complied with this suggestion. Upon these facts and the whole record, the Board concluded that Hachenberg had, on November 16 and all relevant times thereafter, designated the Union to represent him.

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[6] Whiteside, the Union representative, had lost or mislaid the authorization cards and they were not produced at the hearing (R. 21; 44–45). The Board correctly noted, however (R. 33), that "the testimony of the employees involved is itself probative of the Union's majority status." See *Idaho Egg Producers*, 111 NLRB 103, 107, enforced by this Court, 229 F. 2d 821; and see also *N. L. R. B.* v. *Parma Water Lifter Co.*, 211 F. 2d 258, 261 (C. A. 9), certiorari denied, 348 U. S. 829.

Respondent's complaint in essence is that there was no "direct proof" of Hachenberg's designation. As already shown, Hachenberg's direct testimony was unavailable because he was on National Guard duty at the time of the hearing. Respondent, however, cites no authority to establish that such direct testimony is a prerequisite to a finding that Hachenberg had designated the Union as his representative. Indeed, available authority is to the contrary, especially where as here respondent raised no challenge at the time the Union made its claim of majority status. *N. L. R. B.* v. *Trimfit of California,* 211 F. 2d 206, 210 (C. A. 9); *N. L. R. B.* v. *Parma Water Lifter Co.,* 211 F. 2d 258, 261 (C. A. 9), certiorari denied, 348 U. S. 829, and cases there cited. And see *A. N. P. A.* v. *N. L. R. B.,* 193 F. 2d 782, 805 (C. A. 7), certiorari denied, 344 U. S. 812.

Respondent can draw no comfort from the fact that the antiunion petition was ultimately signed by nine employees, or a majority of those constituting the appropriate unit. As this Court said in the *Idaho Egg* case, *supra,* 229 F. 2d at 823–824,

> an employer may not set up as a justification for its refusal to bargain with a union the defection of union members which it had itself induced by unfair labor practices, even though the consequence is that the union no longer has the support of a majority. In such circumstances the employer will be required to bargain notwithstanding that the union does not presently have a majority. *N. L. R. B.* v. *Parma Water Lifter Co.,* 9 Cir., 211 F. 2d 258.

CONCLUSION

The Board's order should be enforced.

Respectfully submitted,

Jerome D. Fenton,
General Counsel,

Thomas J. McDermott,
Associate General Counsel,

Marcel Mallet-Prevost,
Assistant General Counsel,

Arnold Ordman,
Attorney,

National Labor Relations Board.

July 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district

court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of

Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1958

No. 15937

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

HOWARD-COOPER CORPORATION,
Respondent.

RESPONDENT'S BRIEF

On Petition for Enforcement of an Order of the National Labor Relations Board.

FILED
AUG 11 1958
PAUL P. O'BRIEN, CLERK

J. P. STIRLING,
3128 N. E. Broadway,
Portland, Oregon,
Attorney for Respondent.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 7-58

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No. 15937

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On Petition for Enforcement of an Order of the National Labor Relations Board.

JURISDICTION

Appellee concurs with the jurisdictional statements on page 1 of Appellant's Brief.

STATEMENT OF THE CASE

This case arose following a charge by the UAW-CIO that the Howard Cooper Corporation had violated the National Labor Relations Act, particularly Section 8

(a)(1) and 8 (a) (5). The Union apparently solicited some of the employees in November, 1955, but made no claim of representation until several months later. The Union claims it had cards signed by a majority of employees in November, 1955. In January, 1956, the Union wrote the Central Point, Oregon Branch of the employer, claiming that it represented hte employees. The Union followed this with a petition for a certification election to which the employer consented. The Union withdrew its petition for the election and filed unfair labor practice charges, claiming that the employer had, by talking to the employees, violated the Act. The Trial Examiner and the Board found against the employer and the Board is now asking for enforcement of the order.

SUMMARY OF ARGUMENT

The evidence on the record considered as a whole does not warrant the Board's finding that the respondent violated Section 8 (a)(1) and/or (5) of the National Labor Relations Act.

ARGUMENT

The Union's representative contacted some of the employees of the respondent company regarding Union affiliation in November, 1955 (R. 42). From a unit of twelve employees, six testified that they signed bargaining cards at that time (R. 121, 151, 174, 184, 197, 204). A meeting was held with the Union representative at that time which some of the employees attended (R.

44). The testimony as to which employees attended the meeting is conflicting. Two persons, Whiteside, the Union representative, and Bishop, an employee, both stated that seven employees attended the meeting, but Whiteside and Bishop are not in agreement as to which employees attended. Whiteside, after a little leading from the General Counsel's Attorney, named the following seven employees (R. 45, 46): Bishop, Billups, Brown, Long, Hachenberg, Henegar and Curtis. Bishop, in his testimony, says the following employees attended (R. 131): Curtis, Billups, Long, McCoy, Hachenberg, Brown and Bishop. In other words, Whiteside said Henegar was present and not McCoy, and Bishop said McCoy was present but not Henegar. This discrepancy is important as both witnesses are sure that seven employees were present. And seven employees the Union must represent in order to have a majority. Two of the above named employees, McCoy and Hachenberg, were not present at the hearing and did not testify. It is acknowledged that McCoy did not sign a Union card, because there is no claim made that he did so. No card signed by Hachenberg was presented in evidence. The General Counsel's case stands or falls on whether Hachenberg signed a bargaining card. Without Hachenberg, the Union never had a majority of the employees.

It is claimed by the Union that at a meeting in November, some of the employees asked the Union agent to refrain from making any claim of representation (R. 44), and it was not until January, 1956, that the Union representative wrote the company, claiming that he represented the employees (R. 47). Within six days of

his letter of claim, he also filed a petition for a certification election (R. 50).

An officer of the company visited the Central Point Branch in January and talked with the employees. The Board contends that the company officer, by this talk, violated the Act. There is no question but that employers may talk to employees. Nothing came out of this talk except a coffee break for the employees. The company officer advised the employees that he could not grant any increases in wages in view of the Union's claim of representation at that time. This company has periodically given increases in wages throughout its branches, during the last several years, in the month of January. The company officer would have put the wage rate into effect immediately, if he had thought he would not be violating the National Labor Relations Act by doing so. Had he put the wage rate into effect immediately, he would have been charged with a violation of the Act, and, because he did not put the wage rate into effect immediately, but, instead told the employees he could not do it because of this claim of representation, the company is charged with a violation of the Act. In this connection, it is well to take note that the files and records of this case contain full and free affidavits given by Mr. Parker, the company officer abovementioned, and Mr. Thrash, the company foreman. In other words, nothing was held back. The National Labor Relations Board investigator on the case was given every cooperation. The company felt that it had not violated the Act and had no intention of doing so.

As to the claim of majority, seven employees were required for a majority. There is only direct evidence that six employees signed bargaining cards and those six so testified. There is no direct evidence that a seventh, Hachenberg, signed a bargaining card. It must be borne in mind that these bargaining cards were signed in November, 1955, and the claim of representation made in January, 1956. Assuming that seven employees had signed bargaining cards, would seven have still authorized the Union to represent them in January, 1956, or at any later date? The problem is not what existed in November, 1955, but what was the situation in January, 1956. Could not the seventh man have changed his mind in the interim.

On January 12 and 13, nine of the employees drew up, signed and forwarded to the National Labor Relations Board office in Portland, Oregon, with copies to the Union and to the company, a paper, stating that they wished to withdraw any authority ever given the Union and desired to remain "status quo." The seventh man, Hachenberg, signed that petition. Would such a petition be forthcoming if the employees wanted the Union to represent them in January when the company is charged with refusing to bargain? The Union contends that its representative advised several of the employees to sign the petition so that the company would not know that they were Union adherents (R. 81). If that is so, why then did the Union withdraw its petition for an election by which means the certification could have been determined once and for all. That factor raises

considerable doubt as to the Union's majority at the time the company is charged with the refusal to bragain.

Therefore, there is no substantial evidence against the employer on the record as a whole, to support a finding that the employer unlawfully interfered with the rights of its employees or refused to bargain with a duly authorized representative of a majority of its employees.

Respectfully submitted,

J. P. STIRLING, Attorney

No. 15938

United States Court of Appeals for the Ninth Circuit

IRVING I. BASS, Trustee in Bankruptcy of Zipco, Inc., a Corporation, Bankrupt,

Appellant,

vs.

ROBERT H. SHUTAN,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

FILED

APR 18 1958

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—4-4-58

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United States Court of Appeals for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CRAIG, WELLER AND LAUGHARN,
WILLIAM E. BARTLEY,
111 West 7th Street,
Los Angeles 14, California.

For Appellee:

ROBERT H. SHUTAN,
433 So. Beverly Drive,
Beverly Hills, California.

In the United States District Court for the Southern District of California, Central Division

No. 71250-WM

In the Matter of

ZIPCO, INC., a California Corporation,

Debtor.

IN PROCEEDINGS FOR AN ARRANGEMENT

To the Honorable Judge of the District Court of the United States, for the Southern District of California, Central Division:

The petition of Zipco, Inc., a California Corporation, of the City of Los Angeles, County of Los Angeles, State of California, engaged in the business of operating a drill jig bushing manufacturing business, respectfully represents:

I.

Your petitioner has had its principal place of business at Los Angeles within the above judicial district for a longer period of the six months immediately preceding the filing of this petition than in any other judicial district.

II.

No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

III.

The debtor is a person who could become a bankrupt under [2*] Section 4 of the Bankruptcy Act, 11 U.S.C.A. Section 22, and is not a municipality, railroad, insurance or banking corporation, or a building and loan association.

IV.

That your petitioner is unable to pay its debts as they mature and proposes an arrangement for the payment of its unsecured creditors under Chapter XI, Section 322 of the Bankruptcy Act, 11 U.S.C. Section 722, which is contained in Exhibit A annexed hereto and made a part hereof.

V.

That your petitioner will file Schedule A within ten days from the date hereof as per Court Order.

VI.

That your petitioner will file Schedule B within ten days from the date hereof as per Court Order.

VII.

That the statement attached hereto, marked Exhibit "1," and verified by your petitioner's oath, contains a full and true statement of its executory contracts, as required by the provisions of said Act.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

with the provisions of Chapter XI of the Act of Congress relating to bankruptcy.

Dated: April 4, 1956.

ZIPCO, INC.,
A California Corporation.

By /s/ MILO M. TURNER,
President.

/s/ ROBERT H. SHUTAN,
Attorney for Petitioner. [3]

EXHIBIT A

In the United States District Court for the Southern District of California, Central Division

No. ———

IN the Matter of

ZIPCO, INC., a California Corporation,

Debtor.

PROPOSED PLAN OF ARRANGEMENT

Zipco, Inc., the debtor above named, proposes the following arrangement with its unsecured creditors:

I.

Classification of Unsecured Creditors

The unsecured debts of the debtor are divided into the following classes:

a. Expenses of administration incurred herein which may be approved, allowed or ordered paid by the Court;

b. All debts which have priority under Section 64a (2), (4) and (5) of the Act of Congress relating to bankruptcy;

c. All unsecured debts.

II.

Provisions Modifying or Altering the Rights of Unsecured Creditors

The debtor proposes to pay the unsecured creditors in the following manner:

a. Administration expenses— [4]

The debtor will pay the actual costs of administration of the debtor estate as fixed by the Court, and the necessary amounts to be expended for filing and indemnity fees, and the respective attorneys for parties entitled to compensation out of this estate, as, if and when the same are allowed by the Court.

b. Priority debts—

(1) Labor claims. All labor claims entitled to priority shall be paid as soon as moneys are available for that purpose, without awaiting formal confirmation of this Plan of Arrangement.

(2) Tax claims. The debtor proposes to pay all tax claims in full as prior tax claims in such manner and at such time as the various taxing agencies shall agree.

c. To the holders of claims in Class c, the debtor proposes to pay one hundred per cent of the amount

of their claims by the issuance of non-interest bearing negotiable promissory notes to each of said creditors, said notes to be payable in twenty-four equal monthly payments, the first of said payments to be due sixty days after the entry of an order confirming the arrangement.

III.
Provisions for Continuation of Debtor's Business

It is proposed that the business of the debtor, pending the confirmation of this proposed Plan, shall be continued, either by the debtor under the supervision of a creditors committee, or by a Receiver to be appointed by this Court. That the debtor has skilled personnel in its employ; has very considerable work in process and has substantial and satisfactory orders for the sale of its products. That it would be completely disastrous to the welfare of this business and therefore the creditors that there be an interruption or cessation of operation; that the work in process if not completed, would have [5] the value of a very small fraction that it would have after being processed.

IV.
Provisions for Payment of Debts Incurred During Pendency of Arrangement

All debts incurred after the filing of the petition and prior to the confirmation of the arrangement shall be paid in cash when due and shall have priority in payment over debts affected by this arrangement.

V.

Jurisdiction of the Court

The Court shall retain jurisdiction until the deposit and distribution of the money and notes provided for in Article II hereof.

VI.

That upon completion by the debtor of the obligations assumed herein, these proceedings shall thereupon terminate, and the debtor shall be entitled to manage his affairs.

VII.

Possession of Assets

The debtor being firmly convinced that the main interests of creditors lies in the continuity of operation of the business would not object to the appointment of a Receiver by the Court, if this, in the opinion of the Court would be in the best interests of creditors; although management of the debtor is prepared and willing to carry forward with responsible management of an operation by the debtor, subject to supervision of a creditors' committee.

Dated: At Los Angeles, California, this 4th day of April, 1956.

ZIPCO, INC.,
A California Corporation;

By /s/ MILO M. TURNER.
By /s/ ROBERT H. SHUTAN,
Attorney for Debtor. [6]

EXHIBIT I

Statement of Executory Contracts
Zipco, Inc.

	Monthly Obligation
1. Lease on business premises at 6218 Wilton Place, Jan and Charlotte Lustig, Lessors......	$ 625.00
2. Leases on Machinery and Equipment	
Boothe Leasing	1,500.00
International Leasing Corp.	189.00
Masco Machinery	210.00
3. Conditional Sales Contract on Equipment	
Union Bank & Trust	252.00
Commercial Credit Corp.	152.00
I.B.M.	71.00
Pepsi Cola Co.	20.00
Aetna Factors Co.	500.00

ZIPCO, INC.,

By /s/ MILO M. TURNER,
President.

State of California,
County of Los Angeles—ss.

Milo Turner, being first duly sworn, deposes and says that the above statement of executory contracts is a full and true statement thereof.

/s/ MILO M. TURNER.

Subscribed and sworn to before me this 4th day of April, 1956.

[Seal] /s/ ROBERT FEINERMAN,
Notary Public in and for Said County and State. [8]

EXHIBIT A

RESOLUTION AUTHORIZING FILING OF PETITION UNDER CHAPTER XI OF THE BANKRUPTCY ACT

Whereas, it appears to be for the best interests of the corporation, and those interested therein, that a Debtor's petition under Chapter XI of the Bankruptcy Act be filed in order to preserve the assets of the corporation, and to make an equitable arrangement with its creditors:

Now, Therefore, Be It

Resolved: That in the judgment of the Board of Directors, it is desirable and for the best interests of this corporation, its creditors, stockholders, and other interested parties that a petition be filed by this corporation proposing an arrangement under the provisions of Chapter XI of the Act of Congress relating to bankruptcy; and it is further

Resolved: That petition under said Chapter XI shall be filed as shall be submitted by the President of the corporation, and the same hereby is approved

and adopted in all respects, and the President of this corporation is hereby authorized and directed on behalf of and in the name of the corporation to execute and verify such petition and to cause the same to be filed with the District Court of the United States for the Southern District of California, Central Division; and it is further

Resolved: That the officers of this corporation be, and they hereby are, authorized to execute and file all petitions, schedules, lists and other papers, and to take any and all action which they may deem necessary or proper with a view to the successful termination of such proceedings.

I, Stanley C. Sorenson, do hereby certify that I am the Secretary of Zipco, Inc., a California corporation, and that the above is a full, true and correct copy of a resolution of the Board of Directors of said corporation passed and adopted by said Board at a special meeting of the Board of Directors of said corporation duly held and convened on Wednesday, April 4, 1956, and that the same is spread in full upon the Minute book of the corporation.

Dated: April 4, 1956.

/s/ STANLEY C. SORENSON,
Secretary.

[Endorsed]: Filed April 5, 1956. [9]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND ORDER OF REFERENCE UNDER SECTION 322 OF THE BANKRUPTCY ACT

At Los Angeles, in said District, on April 5, 1956, before the said Court the petition of Zipco, Inc., a corporation, that he desires to obtain relief under Section 322 of the Bankruptcy Act, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Joseph J. Rifkind, one of the referees in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Zipco, Inc., shall attend before said referee on April 12, 1956, and at such times as said referee shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said referee or by this Court relating to said matter.

Witness, the Honorable Wm. C. Mathes, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on April 5, 1956.

JOHN A. CHILDRESS,
Clerk;

By /s/ REX LAWSON,
Deputy Clerk.

[Endorsed]: Filed April 5, 1956. [10]

[Title of District Court and Cause.]

ORDER APPROVING APPOINTMENT OF TRUSTEE

At Los Angeles, in said district, on the 31st day of May, 1956, Irving I. Bass, of Los Angeles, California, having been appointed trustee of the estate of the above-named bankrupt by the creditors of said bankrupt, as provided in the Act of Congress relating to bankruptcy,

It Is Ordered that the appointment of said Irving I. Bass, as trustee be, and it hereby is, approved, and the amount of his bond is fixed at $5,000.00 dollars.

JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed May 31, 1956. [12]

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY

At Los Angeles, Calif., in said District, on the 11th day of May, 1956.

The petition of the debtor for an arrangement under Chapter XI of the Bankruptcy Act filed on the 5th day of April, 1956, having been withdrawn and said debtor having consented to being adjudged a bankrupt under the Act of Congress relating to bankruptcy, and there being no opposing interest;

It is adjudged that the said Zipco, Incorporated, is a bankrupt under the Act of Congress relating to bankruptcy.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed May 15, 1956. [11]

[Title of District Court and Cause.]

PROOF OF CLAIM AND POWER OF ATTORNEY

(1) Name of Claimant: Robert H. Shutan.

State of California,
County of Los Angeles—ss.

Robert H. Shutan, of 433 South Beverly Drive, City of Beverly Hills, County of Los Angeles, State of California, being duly sworn, deposes and says:

That the above-named bankrupt was at and before the filing by or against him of the petition for adjudication of bankruptcy, and still is, justly and truly indebted or liable to Robert H. Shutan in the sum of $1,531.45.

That the consideration of said debt or liability is as follows: Wages earned within 3 months preceding the commencement of these proceedings as evidenced by payroll checks (as per attached Exhibit) all of which, together with all rights and claims per-

taining thereto for full and valuable consideration were duly assigned to claimant.

That no part of said debt or liability has been paid and that there are no set-offs or counterclaims thereto; that said claimant does not hold, and has not, nor has any person by his order, or to deponent's knowledge or belief, for his use, had or received, any security or securities for said debt or liability; that the instrument upon which said debt or liability is founded is attached hereto, or is lost or destroyed as set forth in the affidavit attached hereto; that no note or other negotiable instrument has been received for said debt or liability, or any part thereof, except such as is attached hereto; and that no judgment has been rendered on said debt or liability, or any part thereof, except as herein stated.

Designation of Address to Which Notices Shall Be Addressed:

Said claimant hereby requests that all notices to which he may be entitled shall be addressed to the person named in the foregoing Power of Attorney, at his address as therein designated; if no person is named in said Power of Attorney, said claimant requests that said notices be sent to him at the following address:

433 South Beverly Drive,
Beverly Hills, California.

/s/ ROBERT H. SHUTAN,
Deponent.

Subscribed, sworn to and acknowledged before me this 19th day of June, 1956.

[Seal] /s/ ROSE BERGER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 21, 1956. [13]

[Title of District Court and Cause.]

OBJECTIONS TO CLAIMS AND NOTICE OF HEARING OF OBJECTIONS

The undersigned, the duly elected, qualified and acting Trustee in Bankruptcy herein, files his objections to claims which have been filed in these proceedings, and as and for his objections thereto, alleges as follows:

Robert H. Shutan,
433 South Beverly Drive,
Beverly Hills, California.

Claim No. 79—Amount: $1,531.45.

This claim is based on alleged assignments of checks issued for wages to employees of the bankrupt. Your Trustee is informed and believes that in fact no wages were assigned to the claimant; that in fact the bankrupt and not the claimant paid the claimants, and upon such payment these checks

became the property of the bankrupt who then assigned the same to the claimant and that the same therefore did not constitute the assignment of wages or wage claims to the claimant. The California law requires consent, in writing, of the spouse of one who assigns wages and provides that any assignment without the consent of the wife is void. Your petitioner is informed and believes that the claimant did not comply with this requirement and therefore alleges the alleged assignments to be void.

This claim is for legal services rendered in the filing of Chapter XI proceedings and is excessive. The Court should determine the correct amount of the claim and allow the same as a general unsecured claim only.

Wherefore, your Trustee prays that his Objections be heard and appropriate Orders be made in the premises.

/s/ IRVING J. BURNS,
Trustee in Bankruptcy.

To the Above Creditors and Their Attorneys:

You Are Hereby Notified that the Trustee in Bankruptcy herein has made and filed herein his written Objections to claims, as hereinbefore set forth, and the same have been set for hearing before the Honorable Joseph J. Rifkind, Referee in Bankruptcy in the Federal Building, Los Angeles, California, on the 9th day of July, 1957, at the hour of 10:00 o'clock a.m.

Dated: June 17, 1957.

CRAIG, WELLER & LAUGHARN,

By /s/ WILLIAM E. BARTLEY,
Attorneys for Trustee.

[Endorsed]: Filed June 21, 1957. [15]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE CLAIM OF ROBERT H. SHUTAN

The matter of the Trustee's objections to the prior wage claim of Robert H. Shutan in the amount of $1,531.45, designated by the Court as Claim No. 79, having come on for hearing before the undersigned Referee in Bankruptcy on July 9, 1957, at 10:00 o'clock a.m., and the matter having been continued from time to time until August 8, 1957, at 2:00 o'clock p.m., at which time the said matter was regularly called and came on regularly for hearing, the Trustee appearing by and through his counsel, Craig, Weller & Laugharn, by William E. Bartley of counsel, and the claimant appearing in propria persona, and evidence both oral and documentary having been offered and received into evidence, and the Court being fully advised in the premises, the Court does hereby make the following Findings of Fact, Conclusions of Law and Order based thereon:

Findings of Fact

I.

That at all times herein mentioned, Milo M. Turner [18] was the President, sole stockholder and general manager ever since the formation of the bankrupt corporation. That all of the debts of said corporation set forth in the schedules on file were contracted by and under the control and direction of said Milo M. Turner.

II.

That for some time prior to bankruptcy and until immediately prior to bankruptcy, said Milo M. Turner was the only acting officer and director of the bankrupt corporation; that immediately prior to the filing of the bankruptcy proceedings herein, said Milo M. Turner appointed and designated one Stanley M. Sorenson as Secretary of the bankrupt corporation solely for convenience and in order that he could sign the Petition for Arrangement and schedules of assets and liabilities under Chapter XI of the Bankruptcy Act, as Secretary, with said Milo M. Turner as President.

III.

That several days prior to the filing of the arrangement proceedings, and on or about March 28, 1956, Milo M. Turner consulted Robert H. Shutan, an attorney at law, relative to the financial affairs of and for the purpose of filing arrangement proceedings on behalf of the bankrupt corporation, and said attorney did prepare and cause to be filed a

Petition for Arrangement under Chapter XI of the Bankruptcy Act and he did represent said bankrupt corporation in connection therewith and the bankruptcy proceedings ensuing therefrom.

IV.

That Milo M. Turner prior to the filing of the Petition for Arrangement under Chapter XI by the bankrupt corporation, paid various wage claims of the bankrupt corporation with checks of the bankrupt corporation which were dishonored by the bank upon which the same were drawn because of insufficient funds. That [19] said Milo M. Turner thereupon paid said employees in cash for the various payroll checks of the bankrupt corporation which had not been honored by the bank, and which checks thereupon were delivered to the said Milo M. Turner by the payees and holders of said checks totalling the sum of $1,531.45.

V.

That on or about April 4th, 1956, Milo M. Turner transferred and delivered to Robert H. Shutan in payment of his retainer of $1,500.00 for the legal services rendered and to be rendered as aforesaid the said checks which had been turned over to Milo M. Turner, referred to in the preceding paragraph. That Robert H. Shutan has filed a priority wage claim based upon said checks delivered to him. That the Trustee has objected to the priority of said claim as a priority wage claim and to the reasonable value of the charge of said claimant.

VI.

That Robert H. Shutan acted as the attorney of record for the bankrupt corporation both in Chapter XI proceedings and subsequent bankruptcy proceedings, after adjudication.

Conclusions of Law

I.

That said bankrupt corporation is the alter ego of Milo Turner and he is generally liable for the debts of said corporation contacted under his supervision and control. That Robert H. Shutan was in a fiduciary relationship with the bankrupt corporation and with Milo M. Turner. That any claims that Milo M. Turner has should, in equity and good conscience, be subordinated in payment to general creditors. That Robert H. Shutan, as his attorney and attorney for the corporation, and as assignee, stands in no better position than would be assignor, Milo M. Turner. [20]

II.

That if Milo M. Turner had asserted a claim based upon the above-mentioned checks, the said claim would not have been entitled to priority under Section 64-a(2) of the Bankruptcy Act, and the said claim would have been subordinated in payment to the payment of all other general claims on file in the within bankruptcy proceeding.

III.

That Robert H. Shutan could obtain no greater rights than his assignor, Milo M. Turner.

IV.

That the fee of Robert H. Shutan, as attorney for the bankrupt, is subject to determination and review by the Court under Section 60-d of the Bankruptcy Act, United States Code, Title XI, Chapter 6, Section 96.

Order

It Is Hereby Ordered that Claim No. 79 of Robert H. Shutan in the amount of $1,531.45 is hereby denied any prior status; and

It Is Further Ordered that the said claim is allowed as a general unsecured claim only; and

It Is Further Ordered that the said claim be, and the same is, hereby subordinated in payment to the payment of all other general unsecured claims herein; and

It Is Further Ordered that denial of this claim shall be without prejudice of the right of Robert H. Shutan to duly present Petition for Fees as Attorney for the Bankrupt to this Court.

Dated September 4, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

Received September 3, 1957.

[Endorsed]: Filed September 4, 1957. [21]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER

To the Honorable Joseph J. Rifkind, Referee in Bankruptcy:

The petition of Robert H. Shutan respectfully represents:

1. That your petitioner is a creditor of the above-named bankrupt and a claimant in this estate.

2. That on the 4th day of September, 1957, an Order was made by the Referee herein, and filed in this Court, a copy whereof is hereto annexed, marked "Exhibit A" and made a part hereof.

3. Your petitioner being aggrieved by the said Order prays for a review thereof and complains that the Court committed error in making the said Order in the particulars as set forth in the following paragraphs.

4. The Referee erred in respect to said Order, in that the Referee's Finding Number I is clearly erroneous in that said Finding is not supported by the evidence adduced at the hearing on said [22] matter.

5. The Referee erred in respect to said Order, in that the Referee's Findings of Fact Number II is clearly erroneous in that said Finding is not supported by the evidence adduced at the hearing on said matter.

6. The Referee erred in respect to said Order, in that the Referee's Finding of Fact Number III is clearly erroneous to the limited extent that said Finding might be regarded as implying that March 28th, 1956, was the date on which Robert H. Shutan was employed as attorney on behalf of the bankrupt corporation, the uncontradicted evidence being that Robert H. Shutan was retained on behalf of the bankrupt corporation on April 4th, 1956.

7. The Referee erred in respect to said Order, in that the Referee's Finding of Fact Number IV is clearly erroneous, in that the Referee omits to find (line 1, page 3, of said Findings) that the cash with which Milo M. Turner paid said employees, constituted personal funds of said Milo M. Turner and not funds of the bankrupt corporation, this being the uncontradicted evidence adduced at the hearing on said matter.

8. The Referee erred in respect to said Order, in that the Referee's Conclusion of Law Number I is clearly erroneous. The Conclusion that the bankrupt corporation is the alter ego of Milo Turner and said Milo Turner is generally liable for the debts of said corporation is not supported by the evidence adduced at said hearing. The Conclusion that Robert H. Shutan was in a fiduciary relationship with the bankrupt corporation fails to state the date of the commencement of said fiduciary relationship; and there is no evidence to support a conclusion that Robert H. Shutan was in a fiduciary relationship with the bankrupt corporation prior to April

4th, 1956. The Conclusion that Robert H. Shutan was in a fiduciary relationship with Milo M. Turner as an individual is not supported by any [23] evidence adduced at said hearing.

9. The Referee erred in respect to said Order, in that the Referee's Conclusion of Law Number II is clearly erroneous in law, in concluding that Milo M. Turner would not have been entitled to priority under Section 64 a(2) of the Bankruptcy Act, for a claim based upon the above-mentioned payroll checks for which he paid full cash consideration out of his personal funds.

10. The Referee erred in respect to said Order, in that the Referee's Conclusion of Law Number III is clearly erroneous.

11. The Referee erred in respect to said Order, in that the Referee's Conclusion of Law Number IV that the fee of Robert H. Shutan, as attorney for the bankrupt, is subject to determination and review by the Court under Section 60 b of the Bankruptcy Act. Assuming a typographical error in the Referee's Order and that Section 60 d of the Bankruptcy Act is the Section to which reference was made, the said Conclusion of the Referee is likewise and equally clearly erroneous, it being assumed that the "fee" referred to in said Conclusion of Law is the assignment to Robert H. Shutan of the subject payroll checks, it being indisputably established that no payment was made to said Robert H. Shutan by or from the funds of the bankrupt corporation.

Wherefore, your petitioner prays that said Order be reviewed by a Judge of this Court and that the Referee promptly prepare and transmit to the Clerk thereof his Certificate thereon, together with a statement of the questions presented and a transcript of the evidence taken at the hearing or a summary thereof and all exhibits therein offered.

Dated September 12th, 1957.

/s/ ROBERT H. SHUTAN,
In Pro. Per.

Duly verified.

[Endorsed]: Filed September 13, 1957. [24]

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW OF REFEREE'S ORDER OF SEPTEMBER 4, 1957

To: Hon. William C. Mathes, United States District Judge:

The undersigned, Joseph J. Rifkind, a Referee in Bankruptcy of the above-entitled court, does hereby certify as follows:

Statement of Case

The petitioner on review filed a priority claim on June 21, 1956, which has been designated upon the court's records as Claim No. 79, in the amount of $1,531.45. The trustee in bankruptcy on June 21,

1957, filed an objection to the allowance of said claim, which was sustained by the court. The claimant, feeling aggrieved by the order disallowing said claim as a priority claim and subordinating the same as a general claim to the payment of the debts of the bankrupt corporation, has filed his petition for review.

Summary of Evidence

The bankrupt was adjudicated on May 11, 1956. Debts are scheduled in amount of $171,101.03. There will be very little, if any, dividend payable to general unsecured creditors. Irving I. Bass ever since May 21, 1956, has been and now is the duly appointed, qualified, and acting trustee in bankruptcy in this matter.

Milo M. Turner has, ever since the inception and formation of the bankrupt corporation, been its President, sole stockholder, and general manager. All of the debts of the bankrupt corporation set forth in the schedules on file were contracted by the bankrupt corporation under the control and domination of said Milo M. Turner. That for some time prior to bankruptcy and until immediately preceding the filing of the bankruptcy, said Milo M. Turner was the sole officer and director of the bankrupt corporation. That immediately prior to the filing of the bankruptcy proceedings said Milo M. Turner appointed and designated one Stanley M. Sorenson as Secretary of the bankrupt corporation. That said appointment and designation of Stanley M. Sorenson as Secretary was solely for the conven-

ience of Milo M. Turner and in order that the Petition for Arrangement and Schedule of Assets and Liabilities could be filed by the president and secretary of the corporation.

That prior to the filing of the bankruptcy proceedings said Milo M. Turner caused the bankrupt corporation to issue checks to numerous of its employees in payment of the services rendered by them to the corporation. That the payroll checks issued by said bankrupt corporation under the domination and control of said Milo M. Turner were dishonored by the bank upon which the same were drawn because the bankrupt corporation had insufficient funds on deposit with which to pay said checks. That said Milo M. Turner, after said checks had been dishonored, borrowed funds and paid said employees in cash. That said employees upon receiving such cash delivered said dishonored checks to said Milo M. Turner and that said dishonored checks so turned over and delivered to Milo M. Turner totalled the sum of $1,531.45.

That shortly prior to the filing of the bankruptcy (arrangement) proceedings said Milo M. Turner consulted Robert H. Shutan, an attorney at law, relative to the financial difficulties of the bankrupt corporation and for the purpose of filing an arrangement proceeding on its behalf. That on or about April 4, 1956, being the day prior to the filing of the bankruptcy proceeding, Milo M. Turner transferred and delivered to said Robert H. Shutan, said dishonored payroll checks totalling $1,531.45, in

payment of the retainer of said Robert H. Shutan in the sum of $1,500.00 for legal services rendered and to be rendered by him in said bankruptcy proceedings.

That said Robert H. Shutan on June 21, 1956, filed a priority claim which has been designated on the court's record as Claim No. 79, for the sum of $1,531.45. That thereafter on June 21, 1957, the trustee in bankruptcy filed objections to the allowance of said claim as a priority claim and also on the ground that the amount paid to said Robert H. Shutan for legal services rendered and to be rendered in connection with said bankruptcy proceedings was excessive and that the reasonable amount to be allowed to the attorney for the bankrupt should be fixed and determined by this court.

That based upon the facts as herein set forth the referee determined that said claimant was not entitled to a priority claim and that said claim if it was a general claim should be subordinated to the payment of all other general claims of the bankrupt estate. The referee in making said ruling did so upon the basis that the bankrupt corporation was for all intents and purposes the alter ego of Milo M. Turner and that the money advanced to or expended on behalf of said corporation was a capital invesment but if it were a claim that it should upon well established equitable principles be subordinated to the payment of the debts of the corporation incurred under the domination and control of its principal stockholder.

The referee further determined that Robert H. Shutan as attorney for the bakrupt corporation, retained in connection with advising it in regard to its financial difficulties and for the purpose of filing arrangement proceedings on its behalf was not a bona fide purchaser for value but an assignee with notice that said checks transferred to him had been dishonored and with knowledge of the relationship which said Milo M. Turner bore to the corporation and as such assignee, he could not acquire any greater rights and should not be placed in any more favorable position than that of his assignor, Milo M. Turner.

The order sustaining the objection to the claim was expressly made without prejudice to the right of Robert H. Shutan to duly present a petition for fees as attorney for the bankrupt in due course of administration, so that a reasonable allowance could be made for services rendered.

Order of Referee in Bankruptcy

The findings of fact and conclusions of law are incorporated in and made part of the order dated September 4, 1957, from which the review has been taken.

Questions Presented on Review

The Petition for Review asserts the following errors, to wit:

1. That findings of fact Nos. 1, 2, 3 and 4 are erroneous as not being supported by the evidence.

2. That conclusions of law Nos. 1, 2, 3 and 4 are erroneous as not being supported by the evidence.

3. That the order is erroneous for the reason that the conclusions of law are not supported by the evidence.

Documents Transmitted With Certificate on Review

There are transmitted with this Certificate on Review the following documents, to wit:

1. Priority claim of Robert H. Shutan filed June 21, 1956, designated upon the court's record as Claim No. 79, for the sum of $1,531.45.

2. Objection of Trustee in Bankruptcy to Priority Claim of Robert H. Shutan filed June 21, 1957.

3. Claimant's Exhibit No. 1 introduced at the hearing on August 8, 1957.

4. Findings of Fact, Conclusions of Law and Order dated September 4, 1957.

5. Petition for Review of Robert H. Shutan filed September 13, 1957.

6. Transcript of hearing on August 8, 1957.

7. Notice of Filing of Certificate on Review dated October 16, 1957.

The delay in transmitting the Certificate on Review was occasioned by the fact that the petitioner on review belatedly ordered the transcript written

up and the transcript was not received from the court reporter until October 15, 1957.

Dated: October 16, 1957.

Respectfully transmitted,

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed October 16, 1957.

[Title of District Court and Cause.]

NOTICE OF FILING CERTIFICATE ON REVIEW

To: Robert H. Shutan, Claimant in Propria Persona and Craig, Weller & Laugharn, Attorneys for trustee in bankruptcy.

Notice is hereby given that the undersigned Referee in Bankruptcy has this date filed with the clerk of the above-entitled court his Certificate on Review of the Order dated September 4, 1957.

Rule 204(d) of the court provides that the reviewing party, within ten (10) days after the mailing of the notice of the filing of the certificate on review, shall serve upon the respondent and file with the clerk in duplicate a memorandum of points and authorities, and that the respondent shall in like manner, serve and file a reply memorandum of points and authorities within five (5) days thereafter.

Dated: October 16, 1957.

/s/ JOSEPH J. RIFKIND,
Referee in Bankruptcy.

[Endorsed]: Filed October 16, 1957. [27]

[Title of District Court and Cause.]

OPINION

Irving R. Kaufman, D. J.

This is a petition for review of an order by the referee in bankruptcy denying the allowance of a priority claim in the amount of $1,531.45.

The bankrupt was adjudicated on May 11, 1956. Prior to the filing of the Petition for Arrangement under Chapter XI, the bankrupt corporation in payment of various wage claims against it issued a number of checks which were subsequently dishonored by the bank upon which they were drawn because of insufficient funds. Thereupon Milo M. Turner, an officer, director and sole shareholder of the bankrupt corporation, personally borrowed outside funds and paid the employees in cash receiving in exchange the dishonored checks totalling $1,531.45. On April 4, 1956, the day before the filing of the bankruptcy proceedings, Milo M. Turner transferred and delivered to claimant, Robert H. Shutan, these dishonored payroll checks in payment of a $1,500 retainer of Mr. Shutan for legal services rendered and to be rendered by him in the bankruptcy pro-

ceedings. Upon receipt of these checks claimant assumed the responsibility of preparing and filing the necessary bankruptcy papers and representing [50] the bankrupt corporation in the ensuing proceedings.

The claimant alleging a valid assignment of a wage claim, filed on June 21, 1956, his priority claim under Section 64(a)(2) of the Bankruptcy Act, 11 U.S.C., Section 104(a)(2). It is claimant's contention that these checks having been delivered to Turner for good and valuable consideration paid out of Turner's own funds, the rights inherent in such checks vested personally in Turner and that the subsequent assignment transferred such rights to claimant. Objections to the allowance of this claim were duly filed by the trustee and upon submission of the issue to the referee a decision adverse to the claimant was rendered. The referee in disallowing the claim did so on the ground that the bankrupt corporation was for all intents and purposes the alter ego of Milo M. Turner and that the money advanced to or expended on behalf of the bankrupt corporation was a capital investment. The referee found in effect that the payment by Mr. Turner in exchange for the dishonored checks, rather than operating as an assignment, merely cancelled the wage obligation of the corporation and that the assignment of these payroll checks to the claimant created no greater rights in him than those possessed by Turner. [51] The referee further concluded that the legal fee of the claimant was sub-

ject to determination and review by the court under the provisions of Section 60(d) of the Bankruptcy Act, 11 U.S.C., Section 60(d).

The sole issue to be resolved on this review is whether the evidence adduced at the hearing before the referee is sufficient to support the finding that the bankrupt corporation was the alter ego of Milo M. Turner. The basis for the referee's determination was that Milo M. Turner was the president, sole shareholder and general manager of the bankrupt ever since its formation; that the corporate debts were contracted by him and under his direction and control; and that for some time prior to the filing of the bankruptcy petition he was the only acting officer and director of the bankrupt corporation.

In a proceeding of this kind I must accept the referee's findings of fact unless clearly erroneous. However, in the instant case, I find that even if I adopt all the underlying facts supporting the referee's conclusions they are still insufficient in law to establish the relationship by which the bankrupt corporation is to be regarded as the alter ego of Milo M. Turner. The mere fact that all of the corporate stock is held by one person who exercises sole control over the corporation is insufficient to [52] justify disregarding the corporate entity. Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P. 2d 709 (1932); Norens Realty Co. v. Consolidated A. & T. Co., 80 Cal. App. 2d 879, 182, P. 2d 593 (1947). Before a court may

disregard the fiction of separate corporate existence it must appear that:

> "the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be shown * * *" Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, supra, at 129, 17 P. 2d at 711.

See also Wenban Estate v. Hewlett, 193 Cal. 675, 696, 227 Pac. 723, 731 (1924).

In the instant case there is no charge that the monies used to pay the wage arrearages belonged to the bankrupt corporation. Rather the uncontradicted evidence discloses that the sums were loaned to Mr. Turner by third parties and prior to payment were his own personal property. As such there is no element of bad faith or impropriety in the use of these sums to reimburse the employees of the corporation for the value of their services. The piercing of the corporate veil here would work a requirement on the sole shareholder of this bankrupt corporation to turn over his own property to pay the corporate debts and expenses of corporate bankruptcy administration in [53] the absence of a showing of fraud on creditors. See 5 A Remington, Bankruptcy 154 (5th ed. 1953); Re Burlingame Products Co. v. Mackay, 170 F. 2d 29 (C.A. 9, 1948). I must conclude, therefore, that on the basis of the facts before him the referee was in error in con-

cluding that the bankrupt corporation was the alter ego of its sole stockholder.

Section 64(a)(2) of the Bankruptcy Act provides that a claim for wages earned within three months preceding bankruptcy is entitled to priority. Such a claim may be freely assigned and will carry with it into the hands of the assignee the same priority it had in the hands of the original owner. 3 Collier, Bankruptcy 2096-97 (14th ed. 1956); See Shropshire Woodliff & Co. v. Bush, 204 U. S. 186 (1907). It is immaterial that the assignment be made to a stockholder of the bankrupt corporation. In re Door Pump and Mfg. Co., 125 F. 2d 610 (C.C.A. 7, 1942) a group of stockholders paid employees of the corporation the amount of their claims for services in return for an assignment of such wage claims. Although under the applicable Wisconsin law the shareholders were personally liable for unpaid wage claims the court allowed the priority of the assigned wage claims holding that the payment to employees did not operate to extinguish the debt. This [54] case is dispositive of the contention made in the present proceeding that Turner as shareholder and director cannot personally receive an assignment of the claims of the corporation employees.

The transactions involved here, when placed in proper perspective, amount to an expenditure by Turner of some $1,500 out of his own pocket for legal services to be rendered by claimant. Payment to claimant was made by an assignment of the wage

claims which enjoyed priority under Section 64 (a)(2). This procedure was apparently invoked in order that the available cash in the possession of Turner be used to satisfy the wage demands of the corporate employees who were more in need of immediate cash than was claimant. If Turner had not expended the $1,500 out of his own pocket in return for the dishonored checks which he subsequently assigned to claimant, the trustee in bankruptcy would have priority claims filed by the wage earners in the sum of $1,500 and, in addition, a claim filed under Section 64(a)(1) by counsel for fees for the legal services rendered in connection with the bankruptcy proceedings. Since the net result under such circumstances would subject the assets of the bankrupt corporation to priority claims in excess of $1,500 the creditors of the bankrupt are better off under the arrangement here employed by which only one priority [55] claim of $1,500, rather than two, was asserted against the corporation.

Turner owed nothing to the bankrupt corporation and his payment to the wage earners must be regarded as a mere gratuitous act on his part. Such payment did not increase—but if anything decreased —the obligations the trustee would be required to pay.

Having determined that the bankrupt corporation was not the alter ego of Milo M. Turner and that the assignment of the wage claims to Turner was valid and effective, the subsequent assignment to claimant as payment for a retainer of his legal serv-

ices did not involve funds of the corporation and the referee's determination that the attorney's fee is subject to review by the court under Section 60(d) is erroneous.

The referee's determination is set aside and the claim for $1,531.45 is to be accorded priority status. Settle order.

Dated December 30, 1957.

/s/ IRVING R. KAUFMAN,
U. S. D. J.

[Endorsed]: Filed December 30, 1957. [56]

[Title of District Court and Cause.]

ORDER SETTING ASIDE ORDER OF REFEREE AND ACCORDING PRIORITY STATUS TO CLAIM

The above-entitled matter, having come on regularly for hearing before the above-entitled Court, the Honorable Irving R. Kaufman, District Judge, on the 16th day of December, 1957, at 10:00 o'clock a.m. upon the petition of Robert H. Shutan for review of an Order by the Referee in Bankruptcy denying the allowance of a priority claim in the amount of $1,531.45; Robert H. Shutan, claimant, appearing in propria persona and Craig, Weller & Laugharn by William E. Bartley appearing for and on behalf of Irving I. Bass, Trustee in Bankruptcy; and the matter having been argued before

the Court and submitted for the Court's advisement upon such oral argument and upon written Memoranda of Points and Authorities, and the Court having duly considered the same, now, in accordance with the written Opinion of this Court, filed on December 30th, 1957, it is hereby

Ordered as follows:

1. That the Referee's determination of this matter as set forth in the Referee's Order herein dated September 4th, 1957, [57] is hereby set aside;

2. The claim of Robert H. Shutan in the amount of $1,531.45 shall be accorded priority status and is hereby allowed as a prior claim in said amount.

Dated January 17, 1958.

/s/ IRVING R. KAUFMAN,
United States District Judge.

Approved as to Form Pursuant to Rule 7 a, as Amended:

CRAIG, WELLER & LAUGHARN,

By /s/ WILLIAM E. BARTLEY,
Attorneys for Irving I. Bass, Trustee in Bankruptcy.

[Endorsed]: Filed and entered January 21, [58] 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Trustee in Bankruptcy, Irving I. Bass, in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the "Judgment on Review" made and entered by the District Court of the United States for the Southern District of California, Central Division, on January 21, 1957.

Dated February 14, 1958.

CRAIG, WELLER & LAUGHARN,

By /s/ WILLIAM E. BARTLEY,
Attorneys for Trustee.

[Endorsed]: Filed February 14, 1958. [59]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS ON APPEAL

Comes Now Irving I. Bass, Appellant and Trustee in Bankruptcy for the estate of Zipco, Inc., a California corporation, and presents herewith his points on which he intends to rely in support of his contention that the District Court erred:

1. Erred in reversing the Order of the Referee, dated September 4, 1957.

2. Erred in failing to affirm the Order of the Referee, dated September 4, 1957.

3. Erred in setting aside Findings of Fact Numbers I, II, III, IV, V and VI, dated September 4, 1957.

4. Erred in setting aside Conclusion of Law Number I.

A. In not finding Milo M. Turner was the alter ego of the bankrupt;

B. In not finding that irrespective of alter ego, "Any claims Milo M. Turner has should, in equity and good conscience, be subordinated in payment to general creditors."

C. In not finding "that Robert H. Shutan, as his [64] attorney and attorney for the corporation, and as assignee, stands in no better position that the would be assignor, Milo M. Turner."

5. Erred in setting aside Conclusions of Law Numbers II, III and IV.

6. Erred in not approving and adopting all of the aforesaid Findings of Fact and Conclusions of Law.

Dated February 19, 1958.

CRAIG, WELLER &
LAUGHARN,

By /s/ WILLIAM E. BARTLEY,
Attorneys for Irving I. Bass, Trustee in Bankruptcy for Estate of Zipco, Inc., a California Corporation, and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 21, 1958. [65]

In the District Court of the United States for the Southern District of California, Central Division

In Bankruptcy, No. 71,250—WM

In the Matter of

ZIPCO, INC.,

Bankrupt.

Before the Honorable Joseph J. Rifkind, Referee in Bankruptcy.

REPORTER'S TRANSCRIPT OF HEARING ON OBJECTION TO CLAIM #79 OF ROBERT H. SHUTAN FOR $1,531.45, ON THURSDAY, AUGUST 8, 1957, AT 2:00 O'CLOCK P.M.

Appearances:

For the Trustee:

CRAIG, WELLER & LAUGHARN, By WILLIAM E. BARTLEY, ESQ.

For the Claimant:

ROBERT H. SHUTAN, ESQ.
(In Pro. Per.)

Thursday, August 8, 1957, 2:00 P.M.

The Referee: In the Matter of Zipco, Inc., Objection to Claim #79 of Robert H. Shutan for $1,531.45.

Mr. Shutan: Ready for the claimant in pro. per., your Honor.

Mr. Bartley: Ready for the Trustee.

The Referee: Very well, proceed.

Mr. Bartley: If your Honor please, the Trustee's position on the claim in the last portion, it contains an objection that the claim is void due to the failure to secure consent of the wife. That was put in through error in the objection, and is not a valid basis of objection. I would like to have the record show that was put in through error.

The Referee: Very well.

As I understand your objection it is:

(1) You hold that it is not a valid assignment of a wage claim entitling the assignee to priority under Section 64-A(2); and

(2) That the amount is excessive, and I assume that you are referring to Section 60-D of the Bankruptcy Act. Is that correct?

Mr. Bartley: That is correct.

The Referee: Very well, you may proceed.

Mr. Bartley: The Trustee will call Mr. Milo M. [2*] Turner.

The Referee: Mr. Turner, come forward and be sworn, please.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

MILO M. TURNER

called as a witness on behalf of the Trustee, being first duly sworn, was examined and testified as follows:

The Referee: Please be seated and state your full name.

The Witness: Milo M. Turner.

Mr. Bartley: Can we dispense with the usual foundational questions as to his position in the corporation, and so forth? We have examined this witness on numerous occasions, or do you want the record to be complete?

Mr. Shutan: I think we probably ought to have a complete record in this.

We can stipulate he was an officer and director and shareholder of the bankrupt corporation.

Direct Examination

By Mr. Bartley:

Q. Mr. Turner, what office did you hold in the bankrupt corporation, Zipco, Inc.?

A. President.

Q. At the time of bankruptcy were there any other [3] active officers in Zipco, Inc., other than yourself? A. Yes.

Q. What other officers were there?

A. The day we filed bankruptcy, Stanley C. Sorenson.

Q. Isn't it a fact that Mr. Stanley C. Sorenson became an officer merely for convenience to sign the schedules in bankruptcy?

(Testimony of Milo M. Turner.)

Mr. Shutan: If your Honor please, I will object to the question as being leading.

The Referee: The question is overruled.

You may answer the question.

The Witness: Yes.

Q. (By Mr. Bartley): At the time of bankruptcy who owned any stock in Zipco, Inc.?

A. Just myself.

Q. Did any other person or party ever own any stock in Zipco, Inc., other than yourself?

A. No, sir.

Q. At the time of bankruptcy had Zipco, Inc., actually issued any stock?

Mr. Shutan: I will object to that as being irrelevant. I don't see what it has to do with wage claims.

The Referee: At this moment I don't either. I assume it is preliminary at this time.

What is the purpose of these last few questions that I have been permitting to go in here? If they are [4] preliminary, what connection does it have with the claim and the objection thereto?

Mr. Bartley: I will make an offer of proof.

The Referee: Please tell me what the materiality of it is.

Mr. Bartley: The connection is to show the identity between Mr. Turner and the corporation, and to show that probably in fact it was an alter ego; that he was the corporation.

Mr. Shutan: That is no issue here.

The Referee: Let's assume for the sake of argument he was an alter ego. How would that affect

(Testimony of Milo M. Turner.)
the validity of the assignment or the reasonableness of the amount?

Mr. Bartley: I guess the correct time to ask these questions would be in the rebuttal, but it is anticipated that the claimant will claim that Mr. Turner as distinguished from the corporation picked up the labor claim checks which were assigned to the claimant, and the corporation, therefore, didn't cancel the obligation owing on labor checks, and the claim therefore is a valid assignment.

The Referee: Let me hear from you in connection with your objection, Mr. Shutan.

Mr. Shutan: There is a claim filed here on the basis of wage checks. There is an objection filed to the claim on the basis that denial that the wages were [5] assigned, and a claim that the bankrupt and not the claimant paid the claimants. There is no issue here involving the structure of the corporation or the relation of the corporation to the individual, Milo Turner, and I deny that it is the burden, as applied by counsel, of the claimant who has heretofore filed a verified proof of claim, to, as part of the claimant's case, put on evidence as to the nature of the corporation or the structure of the corporation.

The burden is on the objecting party to show some defect in the claim, and there is no issue upon which I have been advised by the pleadings here about the structure of the corporation.

(Testimony of Milo M. Turner.)

The Referee: The objection is overruled. Answer the question. Do you recall the question?

The Witness: No, sir.

The Referee: Was any stock actually issued, is my recollection. Is that correct?

Mr. Bartley: That is correct.

The Witness: Yes, sir.

Q. (By Mr. Bartley): To whom was it issued?

A. To myself.

Q. Was there ever a permit secured from the State of California Corporation's Commissioner to issue stock? A. Yes.

Mr. Shutan: May my objection be deemed to go to this [6] whole line of questioning?

The Referee: Yes.

Q. (By Mr. Bartley): Mr. Turner, did you personally guarantee any of the obligations of Zipco, Inc.? A. Yes, I did.

Q. Approximately how much in dollars and cents worth of obligations of this corporation did you guarantee? A. I don't remember.

Q. Do you recall any of the accounts that you did guarantee?

A. No, I am not sure, two or three of them.

Q. Did you personally guarantee an account with S.C.O.? A. Yes, I believe I did.

Q. Did you personally guarantee an account with Aetna Factors Corporation?

A. No, I don't believe I did guarantee that.

Q. Did you personally guarantee the payment of some sums to a Mr. Harry Halts?

(Testimony of Milo M. Turner.)

The Referee: Aren't we getting pretty far away from a preliminary question?

I overruled the objection because I felt that counsel couldn't prove his case all at one time, but I think we are getting away from preliminary questions. The Court does not see the materiality of these last few questions.

Mr. Bartley: Yes, your Honor. I will withdraw the [7] last question.

The Referee: I am willing to let you be heard if you can show me the materiality of it, but I don't see it at the moment.

Q. (By Mr. Bartley): Are you acquainted with Mr. Shutan? A. Yes.

Q. When did you first become acquainted with Mr. Shutan?

A. When I hired him to represent Zipco to file under a Chapter XI proceeding.

Q. That was approximately how long prior to the time that the petition was actually filed?

A. Four or five days, to the best of my recollection.

Q. Did you make any agreement with Mr. Shutan regarding the means by which this compensation would be paid? A. Yes.

Q. What was the discussion between you and Mr. Shutan?

Mr. Shutan: If counsel will limit his questions to the discussion regarding the compensation, I won't object.

(Testimony of Milo M. Turner.)

Q. (By Mr. Bartley): Relating to compensation is the way that I meant the question. [8]

A. He wanted $1,500 as a retainer, and I didn't have it, nor did the corporation.

I said I would see what I could do about raising the money, after I got home, that is.

In the meantime I had received $1,000 in cash from a man by the name of Robinson, and I asked my wife to borrow $1,500 on her furniture, and out of this $2,500 I had picked up approximately $1,500 in employees' checks. In other words, I had them endorse it, and I had given them the cash.

Then I had retained the checks, and I thought I could turn those in and get the cash back.

However, I talked to Mr. Shutan over the phone, and I said, "I don't have $1,500, but I can assign these labor checks to you in lieu of your retainer."

He was a little hesitant about it, but he finally consented to do that.

Q. What connection did Mr. Robinson have with you?

A. He was a superintendent of Zipco in production.

Q. I couldn't hear your answer.

A. He was superintendent of production.

The Referee: What is that man's name?

The Witness: R-o-b-i-n-s-o-n.

The Referee: What is his first name or initial?

The Witness: Richard R., I believe.

Q. (By Mr. Bartley): Did you inform Mr. Robinson [9] the purpose of obtaining this $1,000?

(Testimony of Milo M. Turner.)

A. No. He owed it to me, and he sold Sierra Coffee Corporation. When he sold that he gave me the $1,000 which he owed to me. Actually he owed me more than that, but it was a part payment of what he owed me.

Mr. Bartley: I have no further questions.

The Referee: You may cross-examine.

Mr. Shutan: I have no cross-examination.

The Referee: Do you want to call him as your own witness now?

Mr. Shutan: May I withdraw my comment?

No, I have no cross-examination. I would like to reserve my examination of Mr. Turner until it is my case in chief.

The Referee: You may step down.

Mr. Turner, resume the stand. I would like to ask you a few questions.

Q. Mr. Turner, attached to the proof of claim of Robert H. Shutan, which appears upon the court records as claim No. 79, are photostats of numerous checks. I want you to look those checks over, and I will ask you if those are the checks that you picked up, to use your expression, from your employees after you received the $1,000 cash from Mr. Robinson, and your wife had borrowed $1,500 on her furniture? A. Yes. [10]

Q. Were these checks all issued to employees of Zipco? A. Yes, sir.

Q. Had they all bounced, to use the vernacular; had they been returned by the bank for insufficient funds?

(Testimony of Milo M. Turner.)

A. I don't know if they had or not, all of them; some of them had.

Q. In any event, you picked up the checks from the employees of Zipco and you paid them cash?

A. Yes.

Q. How long did you have these checks in your possession before you made this arrangement with Mr. Shutan?

A. Not very long, sir; some of them a week, some of them two days. Probably they were all about the same time.

Q. I note that one of the checks attached to this proof of claim is a check in favor of R. A. Robinson for $124.50, dated February 24, 1956. Is that the same Mr. Robinson who paid you the $1,000?

A. Yes.

Q. And calling your attention to that date, the fact that the bankruptcy proceedings, that is, the Chapter XI proceedings were filed April 11, 1956, and this check is dated February 24, 1956, does that refresh your recollection as to how long you had this check in your [11] possession?

A. No. I didn't have it very long. He had held it.

Q. Even though it is dated——

A. When the company was hard up a lot of employees were very loyal, and they held their checks rather than cash them, because—well, some of the employees like Sorenson and Robinson held their checks quite awhile, as long as they were able to.

Q. Most of these checks were issued some time

(Testimony of Milo M. Turner.)

before bankruptcy. Many of them are February checks, and some are March checks. I think the last one issued is dated March 30, 1956, to Lawrence Delorto.

A. There was a keeper in the place at all times. We couldn't discount the receivables.

Q. By that you mean a Sheriff's keeper?

A. Yes.

Q. In other words, someone attached the place of business and put a keeper in charge?

A. Yes.

Q. How long was the keeper there before Mr. Shutan filed the Chapter XI on your behalf?

A. About 60 days.

The Referee: As a result of the Court's questions do either counsel have further questions?

Sometimes when the Court asks questions it prompts [12] counsel to ask further questions.

Mr. Bartley: I have one or two questions.

Q. (By the Referee): Mr. Turner, you were actually managing this corporation, were you not? By that I mean in addition to being president you were the general manager in charge of the corporation? A. I was the responsible officer.

Q. You signed checks?

A. Yes, but the bookkeeping was not done by me.

Q. You hired and fired the personnel?

A. I had the final word, but the general manager was the one that made the recommendation, and I

(Testimony of Milo M. Turner.)
generally did what he said. I didn't know too much about that type of business.

Q. You were in charge of the financing of the corporation?

A. I was supposed to be in charge of raising the money. I countersigned the checks with other people.

Mr. Bartley: If your Honor please, I have no further questions.

Cross-Examination

By Mr. Shutan:

Q. Mr. Turner, I show you a typewritten letter, which appears to be an original, dated April 4, 1956, consisting of a page and one-half. On page 2 appears the [13] signature bearing the name "Milo M. Turner." Is that your signature? A. Yes.

Q. Do you recognize this letter? A. Yes.

Q. This is a letter by which you retained me on behalf of the corporation to file the Chapter XI proceeding on behalf of the corporation and in which you agreed that the compensation should be $1,500 as a retainer, and which you assigned or purported to assign to me wage checks of employees of Zipco totaling $1,531.45. Is that correct?

A. Yes.

Mr. Shutan: I would like to have this marked, so I can go forward with my questioning.

The Referee: The letter from Milo M. Turner to Robert H. Shutan dated April 4, 1956, will be received as Claimant's No. 1.

(Testimony of Milo M. Turner.)

CLAIMANT'S EXHIBIT No. 1

April 4, 1956.

Mr. Robert H. Shutan,
Attorney at Law,
433 South Beverly Dr.,
Beverly Hills, Calif.

Dear Mr. Shutan:

Zipco, Inc., of which I am President, Director and major shareholder, has desired to employ your legal services for the purpose of preparing and filing Chapter XI proceedings on behalf of the corporation and generally representing it in pursuit of the successful arrangement thereunder. However, the corporation has no funds with which to pay you a retainer for such services. In consideration of your agreeing to act as counsel for the corporation, I agree to pay you the sum of Fifteen Hundred ($1,500.00) Dollars as retainer therefor, and in connection with and in payment of the substantial portion thereof, I hereby hand you and also assign and transfer to you all of my interest in and to the following payroll checks of Zipco, Inc.:

Payee	Date	Amount
Charles K. Ailey	2/29/56	$ 1.81
Bart Pierce	3/16/56	25.26
Charles K. Ailey	2/24/56	85.14
R. A. Robinson	2/24/56	124.50
Inez L. Marek	3/ 2/56	65.22
Ernest R. Kolehmainen	3/ 9/56	135.02
Inez L. Marek	3/ 9/56	57.81

(Testimony of Milo M. Turner.)

Sylvester A. Marek	3/ 9/56	$ 36.42
Jean Kerwin	3/ 9/56	80.90
Milo M. Turner	3/ 9/56	97.00
Stanley C. Sorenson	3/ 9/56	78.90
Gus Langensiepen	3/16/56	85.14
Bill Scott	3/16/56	74.81
Stanley C. Sorenson	3/16/56	80.90
Marge Helper	3/16/56	61.55
Jean Kerwin	3/16/56	80.90
Milo M. Turner	3/16/56	97.00
Stanley C. Sorenson	3/23/56	80.90
Milo M. Turner	3/23/56	97.00
Lawrence Dellorto	3/30/56	85.27
Total		$1,531.45

I represent to you that each of the above is a check for wages earned in the employ of Zipco, Inc., and that each of these employees has been paid the full face amount of such check and has endorsed such check in consideration for said payment; [16] and I further represent that none of the moneys used in payment of the above checks constitute funds of Zipco, Inc., but on the contrary, all of these checks were paid from my personal funds and these checks constitute assignments of the wage claims represented thereon.

Very truly yours,

/s/ MILO M. TURNER.

Encs.

Received August 8, 1957.

(Testimony of Milo M. Turner.)

Q. (By Mr. Shutan): Referring to Claimant's No. 1, Mr. Turner, referring to the last paragraph starting at the bottom of page 1, I will read it to you and I will ask you to listen very carefully.

"I represent to you that each of the above"—this refers to a number of checks listed by payee, date and amount——

> "each of the above is a check for wages earned in the employ of Zipco, Inc., and that each [14] of these employees has been paid the full face amount of such check, and has endorsed such check in consideration for said amount.
>
> "I further represent that none of the moneys used in payment of the above checks constitute funds of Zipco, Inc., but on the contrary, all of these checks were paid from my personal funds, and these checks constitute an assignment of the wage claims represented thereon."

Is that what is stated in that letter?

A. Yes.

The Referee: Don't you think the letter speaks for itself, and the Court can read the letter?

Mr. Shutan: Very well.

Q. Was that a true and correct representation?

Mr. Bartley: I will object to that question "Is that a true and correct representation?" The statements are self-serving statements, containing legal conclusions, which would not be a proper question.

Mr. Shutan: I am cross-examining the witness

(Testimony of Milo M. Turner.)
as to what the particular arrangement was which is the issue of this whole case.

The Referee: The objection will be sustained. In other words, this witness cannot testify whether the money was his own money or the corporation's money. [15] That is a matter for the Court to determine. You are calling for a conclusion, and that is the basis of sustaining the objection of counsel.

Q. (By Mr. Shutan): Do you know the source of the funds that were used in the payment of these checks? A. Yes.

Q. Is it as you have just heretofore testified, from the $1,000 that you received from Mr. Robinson together with the $1,500 or so that Mrs. Turner turned over to you from mortgaging the furniture?

A. Yes.

Q. Is it correct that no other funds were used as a source of payment of these particular checks?

A. No.

Q. And particularly, that no funds were withdrawn from the corporation or any of the corporation's assets for these checks?

A. That is right.

Mr. Shutan: I would like to have this in evidence.

The Referee: Claimant's 1 has already been received in evidence.

Mr. Shutan: I thought it was marked for identification.

Q. Mr. Turner, is it not correct that prior to the time that you contacted me in relation to the

(Testimony of Milo M. Turner.)
financial difficulties of Zipco, Inc., that you knew me not at all? [16] A. That is right.

Q. We had never met previously?

A. That is right.

Q. Is it not correct that I told you that before I would accept the responsibility of representing your corporation, Zipco, Inc., and preparing and filing and representing it in a Chapter XI proceeding, that I would have to receive from the corporation or from some outside source an advance retainer? A. Yes.

Q. And it is correct, as I believe you have already testified, that I eventually agreed to accept an assignment from you of these wage checks on account of said retainer? A. Yes.

Q. It is further true, is it not, that upon being retained by the corporation I immediately and forthwith proceeded to the work involved in the preparation of these papers and documents for filing under a Chapter XI proceeding of the Bankruptcy Act on behalf of Zipco, Inc.? A. Yes.

Mr. Shutan: I have no further cross-examination.

The Referee: Anything further?

Mr. Bartley: Yes, your Honor, I have a couple of questions. [17]

claim, but so the record is clear, I have the originals here, and if we may formally have it noted by agreement of counsel and approval of the Court that the photostats may be deemed to be therein satisfactorily in lieu of the originals——

Mr. Bartley: We will so stipulate. We have checked the books and records of the bankrupt and have checked the authenticity of the checks and know that those are photostats of the checks.

Mr. Shutan: I accept that stipulation if the Court will approve it.

Do I also understand that portion of the objection that refers to the consent of the spouse on the assignment has been stricken from the objection?

The Referee: Nothing has been stricken in the objection. If proof is not made to conform, the Court will rule upon it, but the Court is not striking it.

The motion is denied.

Mr. Shutan: I am not making a motion. [20]

The Referee: He may be abandoning it, but you are both experienced enough to understand that it is not stricken from the claim.

Mr. Shutan: Is it correct that you are abandoning on behalf of the Trustee that portion of the objection?

The Referee: Counsel for the Trustee has so stated that he is not relying upon that portion of his objection to the claim. In other words, that is no longer an issue in the objection.

Mr. Shutan: May I as appearing in pro. per. take the witness stand?

The Referee: Yes. It is very important to you that you do.

ROBERT H. SHUTAN

the claimant herein, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Referee: Please state your full name for the record?

The Witness: Robert H. Shutan.

Your Honor, when I wish to speak as a lawyer as distinguished from a witness——

The Referee: You are now talking as a witness; you are not talking as a lawyer. You are taking the stand in your own behalf. [21]

Please be seated and just testify as a witness.

The Witness: My name is Robert H. Shutan. I am an attorney at law, licensed to practice by the State of California, with my office at 433 South Beverly Drive, Beverly Hills, California.

I have been admitted to practice since the year 1943, and I have been specializing in the practice of bankruptcy and insolvency law since 1947.

I first heard of the corporation referred to as Zipco, Inc., somewhere around April 1, 1956. I was contacted by Mr. Milo M. Turner, who identified himself as the president and major shareholder of the corporation.

He stated that I had been recommended to him as a specialist in insolvency and Chapter XI proceedings, and it had been suggested to him that Chapter

(Testimony of Robert H. Shutan.)
XI would be a subject matter that might well be considered on behalf of his corporation.

I discussed the matter at length with Mr. Turner, and got to the matter of fees for myself as counsel for the corporation.

The substance of our conversation was that I would have to have a substantial cash retainer before I would undertake the responsibility of representing this corporation in the Chapter proceedings in the Federal Court.

The figure finally discussed was that of $1500.

Mr. Turner stated to me he would attempt to raise [22] this amount of money.

He stated that the corporation was short of cash, but he felt that he had personal and private resources from which he could raise the necessary money.

I was contacted subsequently by Mr. Turner, who reported that he had raised the money, but that he felt quite disturbed about the amount of unpaid wage claims, and that he had used the money to make up some of the most distressed wage situations of employees who had dire needs, and other checks that had put employees in embarrassing positions; that he had used these checks, that he had purchased these checks with his personal funds, and received endorsements of them, and he had no remaining cash for my retainer.

I believe that he asked me—let me put it this way: he said that is the closest to cash that he had, would I take that on account of the retainer? He

(Testimony of Robert H. Shutan.)
asked me in substance wasn't that for practical purposes the same as cash?

I gave this, naturally, some considerable thought, and checked the law on it, and I determined that the difference was simply a time element, that these would be perfectly valid assignments of wage checks, and that I would simply have to wait for my money until a prior wage claim was paid from the debtor's estate or from any succeeding estate. [23]

I therefore agreed to take those checks, and Mr. Turner brought them into my office. I gather it was on April 4, 1956, because the letter which is Claimant's Exhibit 1 was typed out in my office and signed by Mr. Turner in my office at the time when he handed me the endorsed checks, and at the time when and upon which I agreed to accept the responsibility of representing the corporation and filing the Chapter proceedings.

Your Honor, the further testimony which I wish now to give is addressed to the nature and amount and value of my services, and I give it solely because my motion was overruled regarding that portion of the objection which relates to value of services. It is my position that is totally irrelevant.

The Referee: You are testifying; you are not arguing.

The Witness: May I step down, then?

The Referee: No, you are now a witness. You may offer any testimony now, and at the end of

(Testimony of Robert H. Shutan.)

the case you may argue the case, but don't argue it from the witness stand.

The Witness: All right, sir.

I proceeded to explore all of the factual background that I could in relation to the affairs of Zipco.

I asked Mr. Turner to have compiled for me and to bring in as soon as possible, immediately, if possible, financial information, balance sheets, profit and loss [24] statements, copies of executory contracts, whether they be a lease on the premises or machinery leases or whatever they may be. I wanted him to bring into me all information.

Because of the crucial cash position of the company and the fact that there was either a Sheriff or a Marshal in there—they previously made an assignment for the benefit of creditors which had been made within the week previous, and which had been ineffective, and the continuing operation would have been purposeless unless some immediate steps were taken.

I determined that there was not sufficient time to compile accurately all of the necessary information for the schedule of assets and liabilities before filing the current proceedings, so I further determined that then the best procedure in the interest of the corporation and its creditors would be to seek leave of the District Court to file a petition under Section 322 of the Bankruptcy Act, with leave to ask for 10 days' delay in the filing of the schedules of assets and liabilities and statement of affairs.

(Testimony of Robert H. Shutan.)

Accordingly, I prepared on behalf of the debtor corporation a petition for leave to file proceedings under Section 322, Chapter XI of the Bankruptcy Act and extending the time to file schedules, and attach as an exhibit to that a list of the ten largest unsecured [25] creditors, in accordance with the requirements and desires of the District Court.

I attached also to that proceeding for arrangement, in other words, the Chapter XI originating documents, and in connection with the proceedings for arrangement I prepared and attached and filed a proposed plan of arrangement, which was in accordance with what Mr. Turner and I had previously discussed.

In effect it would have been a general extension and eventual payment of 100 cents on the dollar to the general unsecured creditors, as an exhibit to the plan of arrangement.

I prepared from the information made available to me a statement of executory contracts, and I had to go into these to some extent.

There was a lease on the business premises at 6218 South Wilton Place, with a monthly obligation of $625.

There were a number of leases on machinery and equipment, Booth Heating Company, a major lessor of industrial machinery had a substantial amount of equipment in there, and they were receiving $1500 a month as rent.

National Leasing Corporation had equipment in there, and they were receiving $189 a month.

(Testimony of Robert H. Shutan.)

Masco Machinery had equipment in there under a contract, and they were receiving $210 a month.

Those were the lease contracts. Then there were [26] other executory contracts.

The Referee: The list is attached to the schedules that were filed herein.

In other words, your client gave you a list of the executory contracts and attached them to and made them part of the petition filed. Is that correct?

The Witness: Yes.

I am also stating during the course of the proceeding I examined into these. It wasn't just having, if I recollect, a copy of the list of contracts, but as counsel for the corporation I went into these things. That is the point I seek to make at this time.

I took the various petitions to the District Court, and obtained approval of Judge Ben Harrison for the filing, then I proceeded to file in accordance with the authorization of Judge Harrison.

Incidentally, because of the precarious position of the company, I proposed in the plan that either there be a debtor in possession arrangement or that a receiver be appointed. We did not object to the appointment of a receiver. As a matter of fact, in subsequent consultation, I believe, with the Referee, I did recommend the appointment of a receiver, and the Referee did appoint a receiver.

I went to the plant of Zipco on South Wilton and

(Testimony of Robert H. Shutan.)
personally examined the premises and the setup there and acquainted myself with their physical and objective [27] problems, as well as the more important legal aspects of their problems.

In connection with the performing of services in the Chapter XI proceeding I acted here, as is my custom, to familiarize myself as thoroughly as possible with the operational problems of the debtor, as well as simple factual accounting information as to assets and liabilities, balance sheets and profit and loss statements, which were presented to me, and I analyzed them with the view to determining what would be the most feasible course for the debtor in the Federal Court proceedings, and in connection with one of the documents filed on the first day I prepared and attached an estimated balance sheet as of February 29, 1956, so there would be some guide to the Court and to the Referee immediately, even though the accountants and bookkeepers were then at work trying to get more accurate information.

The estimated balance sheet as of February 29, 1956, indicated a solvent condition, in the bankruptcy sense; that is, the total assets were $244,-526.14.

The total liabilities, according to the information furnished to me from the books and records of the corporation, were $204,324.

The debtor had been engaged in——

The Referee: Just tell us what services you performed. [28]

(Testimony of Robert H. Shutan.)

The Witness: This is preliminary.

The Referee: As far as the figures themselves are concerned, the Court can read that. Just tell us what you did; what your services were, Mr. Shutan.

The Witness: I was going to discuss the S.C.O. contract, and I was only going to say preliminarily that the debtor had been engaged in the manufacture of certain kinds of bushings.

The Referee: In other words, you had conferences with your client; prepared a petition for arrangement; were present at the first meeting of creditors; you tried to get the debtor to stay in possession, which the Court denied; a receiver was appointed, and shortly thereafter operations were suspended.

Tell us what you did. In other words, merely going into statistical information of the debtor is not going to help the Court.

The Witness: Your Honor, I was only going to preliminarily say the debtor was engaged in the manufacture of drill jib bushings. Their main outlet was S.C.O. Tool Company.

It appeared from my observation that substantially all of the finished merchandise—I think it was $60,000 worth—corresponding to what I was informed, was located at S.C.O. Tool Company, and this was the success or failure, as it first appeared, of our plan depending upon the sale [29] and the merchandising of these bushings at S.C.O. Accordingly, I examined the S.C.O. contract. I had conferences with Mr. Rodd Kelsey, attorney, who is

(Testimony of Robert H. Shutan.)
attorney for S.C.O., and I spent some hours trying to develop this situation and be fully informed and find out under what circumstances we could get the $60,000 worth of finished bushings into the possession of S.C.O. Tool Company, and released and available for sale.

I continued those efforts in connection with the S.C.O. at the request of Mr. Bass, the Receiver, after he was appointed.

There were problems in connection with the fact that there was a Lawrence Warehousing situation for part of the merchandise. Aetna Factors was the party in interest, as I recall, and they had an obligation, my memory is, that was around $13,000 or $11,000, secured by a field warehousing through Lawrence Warehousing at the premises.

As part of my job as counsel for the corporation it was necessary for me to know exactly what all of their contracts and obligations and assets were. I examined into the Lawrence Warehousing situation and the Aetna Factors situation. In the meantime, the debtor was being vigilantly pressed by some of the lessors of some of the machinery and equipment.

During the period of the week of the filing there were several claim and delivery lawsuits filed. I examined [30] into these contracts. I examined into these complaints after the receiver was appointed and at the receiver's request. I continued giving what information I could in relation to these.

At the receiver's request I consulted with Mr. Turner on numerous occasions in order to assist the

(Testimony of Robert H. Shutan.)
receiver in determining his position in connection with the suit by M. W. Silverman in connection with the lease on a Rigid Mill—that is a trade name. There was a claim and delivery suit by Booth Leasing Company, and I spent a number of hours in connection with that, both on behalf of the debtor and in connection with assisting the receiver and getting information and answering his questions on that.

At the receiver's request I went to the plant again, I believe, it was on the 5th or 6th of April, and I spent a number of hours there working with the receiver and the debtor.

The receiver at that time, I believe, had been sent out by the Court to explore the possibility or the advisability or non-advisability of a receiver's operation, and I made myself available to the receiver at the plant, and rendered all possible assistance.

At the receiver's request or at the Court's request—it may have been the Court's request—I met with the receiver in court on the following day, and had a most [31] extended discussion concerning the receiver's possible operation, and the pros and cons, and contributed as objectively as I could, and I believe that was objectively my analysis of the situation.

There was a petition for reclamation filed by the Masco Machinery Company and another one by Com-Air and another one by Guy Whitaker Company.

I concerned myself with these preliminarily, and

(Testimony of Robert H. Shutan.)

later at the request of the receiver gave what assistance I could in connection with this litigation and these lawsuits.

The Referee: At this time we will take our afternoon recess.

(Recess.)

The Referee: Please proceed.

The Witness: To illustrate one of the things I have just mentioned, on April 24th, I received from the receiver, Irving I. Bass, a letter dated April 23rd, in which he sent to me a petition for order of reclamation in the Zipco matter, forwarded to me by Mr. Devor. This is the one filed by Com-Air. He wanted to discuss the matter with Mr. Turner to determine—that is, he wanted me to discuss the matter with Mr. Turner to determine whether Zipco had any claim to the tooling identified in the petition, and what was the property of the petitioner. [32]

He also in the same letter asked me to check with Mr. Turner concerning the property belonging to the Guy Whitaker Company, consisting of approximately 25,000 forgings, and to advise him whether or not this should be released to the Whitaker Company without the payment of any moneys. This was in relation to the petition for reclamation which had been filed by attorneys Gray and Gray.

In accordance with the request of Mr. Bass, I discussed the Com-Air matter with Mr. Turner. I

(Testimony of Robert H. Shutan.)
discussed the Guy Whitaker matter with Mr. Turner, and I then advised Mr. Bass in connection with the documents he sent me, the petition for reclamation, which was somewhat involved.

I believe a similar situation was in relation to the Masco Machinery petition for reclamation.

At the time I became counsel for the debtor corporation they were in the middle of a problem in connection with their lease on the premises. The property had just been sold, and the purchasers apparently were attempting to rescind, and I was contacted by representatives of the purchasers—pardon me, that is incorrect.

I was contacted by the representatives of the sellers, and had considerable discussions with, I believe, Mr. Jules Altemas of the Altemas Real Estate Company. Although he was a broker, he was a principal in that transaction, [33] and it took considerable time, having several discussions with him about the current proceedings, because apparently our proceedings were one of the key problems of the transaction of the purchase and sale of the real property, of the premises.

A considerable amount of my time, during the month of April, was concerned with contacts from creditors, inquiries from creditors, inquiries from markets and gas stations and others who had cashed checks, particularly payroll checks of the debtor corporation, and a considerable amount of time went into those telephone conversations and some correspondence on that.

(Testimony of Robert H. Shutan.)

As I stated, the District Court had allowed us 10 days within which to file the schedule of assets and liabilities. This involved a tedious amount of work, both by personnel in Zipco, the bookkeepers and myself.

I told them that the information that we put in the schedules had to be as accurate and precise as possible. We wanted every single creditor accurately listed therein, and I wanted as accurate as possible balances due on machinery contracts, conditional sales contracts and so forth. It was necessary for me to work at some length with representatives of the company to get this scheduled information. It was most involved, and as the schedules show, there were some, for example there were some $97,000, almost $98,000 owing on eleven encumbrances, or at least, [34] agreements for conditional sales contracts. I refer to schedule A-2 of the schedules, rather than reading them into the record here.

I had to work and devote considerable time with the bookkeepers, as I recall, in an attempt to get as accurate information as possible about the taxes owing, and for which quarters, and so forth. That presented a considerable task.

To summarize on the schedules, by the nature of the operation of this debtor and by the amount of the liabilities and the amount of the assets and the degree to which the assets were encumbered by contract and leases and so forth, there was required an extraordinary and unusual amount of

(Testimony of Robert H. Shutan.)

time by myself as counsel in the preparation of the schedules and assets and liabilities, and also in the preparation of the Statement of Affairs. Such schedules and Statement of Affairs were, of course, filed in due course.

The receiver in the meantime had determined it would not be feasible or not in the interests of the estate to have a continuing operation of the business, and he had, with the approval of the Court, discontinued the operation of the business.

The receiver, however, did consult with me, not only in the matter aforesaid, but in connection with any assistance that I or myself with Mr. Turner's help could [35] give him as far as sources of sale of some of the merchandise, some of the equipment which he had on hand, and there were a number of additional discussions which I had with Mr. Bass, the receiver, during the month of April.

I worked very closely with Mr. Turner in his effort to procure new financing. After all, this was the prime purpose of the Chapter XI, to keep this debtor alive and continuing in business, so that it might turn into a successful operation, and the creditors might be paid.

It was determined that the cessation of operation by the receiver did not of itself make impossible a successful plan, and Mr. Turner, particularly, with myself assisting somewhat went forward with efforts to obtain the necessary financing even after the termination of operations.

However, we knew we had only a limited time,

(Testimony of Robert H. Shutan.)
and Mr. Turner reported to me that he was unsuccessful in obtaining what we regarded as an arrangement, a satisfactory arrangement, for new capital, and new capital was absolutely essential if we were to have a successful plan of arrangement.

Accordingly, on my own motion I advised the Court and the receiver that we were unable to come up with a plan, and as I recall it, volunteered the thought that we did not want to string out or continue a debtor proceeding [36] that was a hopeless one, and accordingly I prepared with the consent of the corporation a document entitled, "Withdrawal of proposed plan of arrangement and consent to adjudication."

This was executed on or about the 2nd of May, 1956, and I caused it to be filed with the Court that day or shortly thereafter, which was approximately one month after I came into the case.

Subsequently I appeared on behalf of the debtor as counsel for the debtor at the first meeting of creditors after adjudication.

There was an adjudication, of course, after the first meeting of creditors on May 31, 1956. Then there was a continued first meeting of creditors on June 4th, at which time I was present on behalf of the debtor.

My notes reflect a further first meeting on June 11th. Frankly, I am not sure whether that actually occurred, or whether I was present on the June 11th meeting.

I was present at a further continued first meet-

(Testimony of Robert H. Shutan.)

ing of creditors on the 18th of June, in my capacity as counsel for the bankrupt.

Throughout these proceedings I have made myself available to the Trustee and counsel for the Trustee, and I have co-operated on every occasion that had been requested of me to advise in the administration of this [37] estate.

I would say my main services to the estate were to the receiver rather than to the Trustee, and that I rendered legal services of considerable value to the creditors and to the estate at the request of the receiver during the period of the receivership, and at a time when I was also attorney for the debtor in the fashion and manner to which I have just testified.

There were a number of other probably lesser legal problems and practical problems which came to my attention and received my attention during the period of April 4, 1956, through to the present, but particularly through the June 18th meeting of creditors.

I would estimate that in the manner to which I have testified and the services which I have performed for this estate for the debtor and in assisting the receiver, that I have expended approximately 40 to 45 hours.

I have received no compensation whatsoever from this estate or from anyone else on behalf of this estate, other than the subject payroll checks on which I took an assignment, and which is the basis of the subject claim.

The Referee: Do you wish to cross-examine, counsel?

Mr. Bartley: I have no cross-examination.

The Referee: You may step down.

Is there any further evidence?

Mr. Bartley: I have no further evidence. [38]

Mr. Shutan: I have no further evidence.

The Referee: Do you wish to be heard in this matter, Mr. Bartley?

Mr. Bartley: Yes, your Honor.

(The matter was argued by counsel.)

The Referee: The Court has heard the evidence and has heard the argument, and is prepared to rule in this matter.

We have here a bankrupt estate, and the schedules show wages, $9,436.68; taxes due to the United States of $13,000; taxes due to the State of California of $3,000; secured claims of $97,893.35; unsecured claims, $47,741.74, or a total indebtedness of $171,101.03.

The Court must take cognizance of the fact that the dividends, even to prior claimants, will be small, and probably there will be no dividend to general unsecured creditors, or a very, very nominal amount, if any.

These debts were incurred under the management of Mr. Turner, who was president and sole stockholder. He shaped and controlled and brought about the destinies of this corporation.

He had a legal obligation to see that the prior labor claims were paid. In fact, if the corporation

did not have money to pay labor which it incurred, there was a civil obligation on his part and a potential criminal liability also on his part. Therefore, he obtained this money and [39] picked up these checks that had been issued to wage claimants.

Certainly if he had filed a proof of claim contending that he was entitled to priority because he had paid these labor claimants, under the same circumstances the Court would not have any doubt in its mind that the claim was not entitled to priority, and any claim that he had, whether it be a prior claim or a general claim, should be subordinated to the payment of all creditors of the bankrupt estate.

Certainly an assignee can get no greater right than his assignor, and that is particularly so when the claimant is a fiduciary, standing in the position of the relation of attorney to client.

For all intents and purposes this corporation was Mr. Turner. If it was not technically his alter ego, it certainly was for all intents and purposes his alter ego in this particular matter.

It is the ruling of the Court that the claim of Mr. Turner for money be paid to these labor claimants was a general unsecured claim, and that it should be subordinated to all other claims of this estate, and that the claim of his assignee is no greater than that of Mr. Turner.

The ruling, however, is expressly made without prejudice to Robert H. Shutan as attorney for the debtor [40] and the bankrupt, in due course of administration to file his petition for reasonable al-

lowance for services which he rendered to the debtor and the bankrupt, not to the receiver.

In other words, no person is entitled to be compensated for services rendered to a receiver or trustee unless that attorney is duly authorized by order of Court to represent the Trustee in bankruptcy.

Counsel for the Trustee will prepare, serve and submit an appropriate order in this matter.

Mr. Shutan: I would like to have findings, your Honor.

The Referee: You are entitled to findings, unless you waive them.

Mr. Shutan: I would like to have findings.

The Referee: Very well.

Court will stand adjourned. [41]

Certificate

I, Louis Sommers, hereby certify that on the 8th day of August, 1957, I attended and reported, as official court reporter, the proceedings in the above-entitled and numbered matter before the Honorable Joseph J. Rifkind, Referee in Bankruptcy, in said Matter, and that the foregoing is a true and correct transcript of the proceedings had therein on said date, and that said transcript is a true and correct transcript of my stenographic notes thereof.

Dated at Los Angeles, California, this 14th day of October, 1957.

/s/ LOUIS SOMMERS,
Official Court Reporter.

[Endorsed]: Filed October 15, 1957. [42]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 66, inclusive, containing the original:

Petition for Arrangement, filed 4/5/56.

Order of Reference.

Adjudication of Bankruptcy.

Order approving Appointment of Trustee (certified copy).

Claim of Robert H. Shutan.

Objections of Trustee to Claim of Robert Shutan.

Claimant's Exhibit No. 1.

Findings of Fact, Conclusions of Law and Order re Claim of Robert H. Shutan.

Petition for Review of Referee's Order.

Notice of filing Certificate on Review.

Points and Authorities in support of Petition for Review.

Trustee's reply Memorandum to Points and Authorities in opposition to Petition for Review of Referee's Order.

Memorandum of Opinion.

Order setting aside Order of Referee and according priority status to claim.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Appellant's Statement of Points on Appeal.

B. One volume of Reporter's Transcript of Proceedings had on August 8, 1958.

I further certify that my fee for preparing the foregoing record, amounting to $1.60 has been paid by appellant.

Dated: March 7, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 7, inclusive, containing the original:

Certificate on Review of Referee's Order of September 4, 1957, dated October 16, 1957.

Amendment to Designation of Contents of Record on Appeal.

I further certify that my fee for preparing the foregoing record, amounting to $1.20 has been paid by appellant.

Dated: March 11, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 15938. United States Court of Appeals for the Ninth Circuit. Irving I. Bass, Trustee in Bankruptcy of Zipco, Inc., a corporation, bankrupt, Appellant, vs. Robert H. Shutan, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 10, 1958.

Docketed: March 19, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15938

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Irving I. Bass, Trustee in Bankruptcy for the Estate of Zepco, Inc., a California corporation,

Appellants,

vs.

Robert H. Shutan,

Appellee.

APPELLANTS' OPENING BRIEF.

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FILED

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No. 15938

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Irving I. Bass, Trustee in Bankruptcy for the Estate of Zipco, Inc., a California corporation,

Appellants,

vs.

Robert H. Shutan,

Appellee.

APPELLANTS' OPENING BRIEF.

Statement of Jurisdiction.

This is an appeal from an order of the District Court, Southern District of California, Central Division, reversing on review Findings of Fact, Conclusions of Law and Order of a Referee in Bankruptcy. Jurisdiction of the District Court existed under Section 57d of the Bankruptcy Act, Title 11, United States Code, Chapter 6, Section 93. Jurisdiction of this Circuit Court of Appeals lies under Section 47(a) and (b) of Title 11, U. S. C. A.

Statement of the Case.

This is an appeal from an order of the District Court reversing Referee Joseph J. Rifkind on review. The appellee is the attorney for the bankrupt corporation and the matter involved is a claim filed by the appellee as a prior

wage claim based upon alleged assignments of wage claim checks of the bankrupt corporation to the appellee in payment for his legal services as attorney for the bankrupt.

The facts surrounding the claim of the appellee are that approximately one week prior to the filing of a petition for arrangement under Chapter XI of the Bankruptcy Act, Milo M. Turner, the president, sole shareholder, sole director, sole officer, and managing officer of the bankrupt corporation [see Tr. p. 63], visited the offices of the appellee with a view towards filing a petition for arrangement under Chapter XI on behalf of the bankrupt corporation. Milo M. Turner could not pay the fee requested by the appellee in the amount of $1,500.00 and it was agreed that Milo M. Turner would assign certain dishonored wage checks of the bankrupt corporation, which he had redeemed, to the appellee, and a written assignment was made and entered into. [See Tr. p. 64.]

At the time of the making of the so-called assignment the bankrupt corporation was insolvent and Turner was the only officer the corporation had ever had, and was the sole shareholder, although for convenience of executing the schedules in bankruptcy, one Sorenson was made a director and an officer of the corporation immediately prior to bankruptcy. [See Tr. pp. 45-46.] The Chapter XI proceeding was filed and proved abortive a few days subsequent to its filing and an order of adjudication was made and entered approximately 4 days after the filing of the chapter proceedings.

The Trustee filed objections to the claim of the appellee alleging that the effect of the transaction was that the corporation had cancelled its own indebtedness and that there was nothing left to assign to the appellee, that the appellee's claim should be denied and, in any event, should be subordinated to other claims and not allowed any prior status.

The Trustee, at the hearing before the Referee, urged that the claim should be denied or subordinated for the reasons that the bankrupt corporation was the *alter ego* of Milo M. Turner and the effect of Turner paying the corporation's dishonored checks was to cancel the corporation's indebtedness to the individual employees and to cancel the order to pay the check, the assignment therefore being an idle act as there was nothing left to assign. The Trustee claimed that in any event Turner, being the managing officer during the time that the debts were incurred, the sole officer and sole shareholder of this corporation, the Court, in equity and good conscience, should not allow Turner to participate as a prior wage claimant in his own corporation and should, in equity and good conscience, subordinate him to all other general unsecured claims and the appellee, being an assignee, should likewise be subordinated on the theory that he could obtain no greater rights than his assignor, the president of the bankrupt corporation. The Trustee also claimed that the transaction was a subterfuge attempting to circumvent Section 60d of the Bankruptcy Act, United States Code, Chapter 4, Section 96, wherein it is provided that

if money is paid directly or indirectly to a counselor at law, etc. for services rendered in connection with the bankruptcy proceedings, the Bankruptcy Court has power to review the reasonableness of the fees.

The Court made and entered Findings of Fact, Conclusions of Law and an Order sustaining the position of the appellant in each particular and the appellee filed the petition for review to the District Court.

The matter was orally argued before the Honorable Irving R. Kaufman, District Court Judge, a visiting Judge from New York, who wrote a memorandum opinion reversing the Referee in Bankruptcy and ordering that the claim of the appellee be accorded prior wage status. This memorandum opinion is a portion of the record on review and may be found at pages 33-39 of the Transcript. Issues in this appeal arise from the said memorandum opinion which, on page 35 of the Transcript, arrives at the conclusion that the sole issue is whether or not Milo M. Turner was the *alter ego* of the bankrupt corporation. The main portion of that opinion dwells on *alter ego* and concludes that there is insufficient evidence to support a finding of *alter ego,* makes only passing mention that wages or wage claims may be assigned to stockholders, and at page 37 of the Transcript hinges its determination on this issue on the fact that some cases hold that a shareholder and a director can receive an assignment of claims of corporation's employees, completely ignoring the point that Turner was not only a shareholder and director, but the sole managing officer and sole director of the bankrupt corpora-

tion, making no consideration of this issue. The Judge then, on pages 32 and 33 of the Transcript summarily disposes of the contention relation to Section 60d of the Bankruptcy Act by concluding that the funds were Turner's individual funds and the money did not come directly or indirectly from the bankrupt. No consideration was given as to whether or not under the circumstances the payment of the checks involved would be construed to be a capital contribution by Turner to the corporation and that the payment or payments therefore were payments of the corporation.

From the order based upon the memorandum opinion of Judge Kaufman, the appellant prosecutes this appeal.

Specifications of Errors Relied Upon.

The Court erred in each of the following respects:

1. In reversing the order of the Referee dated September 4, 1957.

2. In failing to affirm the order of the Referee dated September 4, 1957.

3. In setting aside Findings of Fact Nos. 1, 2, 3, 4, 5 and 6 dated September 4, 1957.

4. In setting aside Conclusion of Law No. 1.

5. In deciding in the memorandum opinion that Milo M. Turner was not the *alter ego* of the bankrupt and in not finding, that Milo M. Turner was the *alter ego* of the bankrupt corporation.

6. In not finding that irrespective of *alter ego* "any claims of Milo M. Turner should, in equity and good conscience, be subordinated in payment to claims of general creditors".

7. In not finding that irrespective of equitable theory or *alter ego,* any payments made by Milo M. Turner to wage claimants, whether from individual funds or not, amounted to capital contributions to the capital structure of the corporation and therefore cancelled such wage claims as against the corporation.

8. In not finding "that Robert H. Shutan, as the attorney for Milo M. Turner and as the attorney for the bankrupt corporation and assignee of Milo M. Turner, stands no better position than the would be assignor, Milo M. Turner."

9. In setting aside Conclusions of Law Nos. 2, 3 and 4.

10. In not finding that the procedure used by the appellee was an attempt to circumvent by subterfuge the effect of Section 60d of the Bankruptcy Act.

Summary of Argument.

In essence the entire argument of the appellant is devoted to the proposition of law that the reviewing Court should affirm the order of the Referee if the order is supported by any substantial evidence or may be supported under any theory of the law and in connection with this proposition it is argued that the reviewing Court overlooked the fact that Milo M. Turner was more than a

mere bona fide shareholder and director and was in fact the sole officer, the sole director, the sole shareholder and the managing officer of the bankrupt corporation at the time the wage obligations were incurred. That in considering the argument that any claims of Milo M. Turner would, in equity and good conscience, be subordinated in payment to the payments of all other general claims, the reviewing Court considered only cases dealing with bona fide shareholders or directors of bankrupt corporations and did not relate to a situation where all of the aforementioned factors were combined. It is also urged that at the time when Milo M. Turner paid the wage claimants the corporation was insolvent and such payments under the circumstances would amount to capital contributions to the corporation by Turner and could not place him in the status of a prior wage claimant. It is also argued that the evidence was more than sufficient to support a finding that Turner was the *alter ego* of the bankrupt corporation. Lastly, it will be urged that this is an attempt to circumvent the application of Section 60d relating to the reviewing of fees of attorneys for bankrupts by the Referee and would open the door to excessive fees being charged by attorneys for bankrupts and not being subject to review by the Court. From the foregoing arguments it would follow that the corporation paid its own wage claims, that the wage claims then became non-existent and there was nothing left to assign other than a capital interest in the corporation to the appellee or that the claim should be subordinated, as an assignee can acquire no greater rights than his assignor.

ARGUMENT.

I.

The Reviewing Court Should Accept the Referee's Findings of Fact, Conclusions of Law and Order Unless Such Findings Are Clearly Erroneous.

Findings of the Referee in Bankruptcy are presumptively correct and will not be set aside unless clearly erroneous. (*Gold v. Gerson,* 225 F. 2d 859, 861; General Rules of Civ. Proc., Rule 52(a), 28 U. S. C. A., C. C. A. 9th, 1955; *In re Collins,* 141 Fed. Supp. 25 (S. D. Cal.).)

The further proposition that if any of the findings are not clearly erroneous and such findings would support the order, the Court will not reverse the Referee, is so well established as a matter of law that the proposition does not need citation of authority at this point.

II.

Milo M. Turner Was More Than a Mere Shareholder or Director and His Claim in Equity and Good Conscience Would Be Subordinated to the Payment of All Other General Unsecured Claims in the Bankruptcy Matter.

The District Court, in considering the issue presented as to whether or not the claim of Milo M. Turner should be subordinated, concludes at page 35 of the Transcript "the sole issue to be resolved on this review is whether the evidence adduced at the hearing before the Referee is sufficient to support the findings that the bankrupt corporation was the *alter ego* of Milo M. Turner". The only further consideration of this problem which we can find is found in the first four paragraphs on page 37 of the Transcript where the Court cited *In re Dorr Pump & Mfg. Co.,* 125 F. 2d 610 (C. C. A. 7, 1942), for the

proposition that it is immaterial that an assignment be made to a stockholder of a bankrupt corporation. A thorough reading of the said memorandum opinion leaves one with the impression that at no point in the memorandum opinion was any consideration given to the fact that immediately prior to bankruptcy Turner was the only active officer in the bankrupt corporation [see Tr. pp. 45, 46, 53], that Turner was the sole shareholder of the bankrupt corporation [Tr. p. 46], that Turner gave personal guarantees to several creditors [Tr. p. 48], that Turner was the sole responsible officer of the corporation [Tr. p. 53], and the managing officer of the bankrupt corporation at the time the wages were incurred. [Tr. p. 53.]

Finding of Fact No. 1 made by the Referee, the findings being designated in the record on appeal, finds that Turner was President, majority shareholder and managing officer of the bankrupt corporation. Finding of Fact No. 2 finds that Turner was the only acting officer and director of the bankrupt for some time prior to bankruptcy. Finding of Fact No. 9 finds that the appellee knew or should have known of the relationship of Turner to the bankrupt corporation and thus removes him from the status of being a bona fide purchaser for value without knowledge of infirmities. Conclusion of Law No. 2 finds that if Turner has asserted the claim personally, the claim would have been subordinated to the payment of all other general claims on file in the bankruptcy proceedings, and the order provides that the claim be subordinated in payment. It is submitted that the evidence clearly supports each and every one of these findings and the order of the Referee, and that the reviewing Court committed reversible error in failing to consider this issue. The law is clear that under the circumstances Turner's claim would

have been subordinated and the appellee, being the assignee of Turner, could acquire no greater rights than his assignor, Turner. It will be demonstrated below that the law is clear that the claim of Turner would, in equity and good conscience, be subordinated to the claims of all other general creditors herein.

The Bankruptcy Court has full power to subordinate claims and adjust equities. (*Sampsell v. Imperial Paper,* 313 U. S. 215, 85 L. Ed. 1293, 61 S. Ct. 904, 45 A. B. R. (N. S.) 454; *Bank of America v. Erickson* (C. C. A. 9), 45 A. B. R. (N. S.) 503, 117 F. 2d 796.)

Mere reasons of equity may sometimes require that a creditors' claim be either totally disallowed or subordinated to the claims of all or of certain other creditors, such as where the creditor is closely related to the bankrupt or as a majority stockholder or corporate officer should be treated as a proprietor rather than as a creditor. (Vol. 3, Collier on Bankruptcy, 14th Ed., p. 185, Sec. 57.14, and cases cited therein.)

If one entirely controls the affairs of a corporation and owns a substantial part of it and furnishes the corporation money, the funds so advanced will be deemed a capital contribution. He cannot under these circumstances prove a claim in competition with other creditors of the corporation. (*In re Rickshaw,* 12 Fed. Supp. 424 and 426.)

In *Bank of America v. Erickson, supra,* the Court says on page 798, as follows:

> ". . . The Bankruptcy Court has undoubted power to subordinate a general claim to other claims in the same category where for any reason legal or equitable, it ought to be subordinated . . ."

In *Pepper v. Litton,* 308 U. S. 295, the Court states

> ". . . The Bankruptcy Court, in passing on allowance of claims, sits as a Court of equity. In the exercise of its equitable jurisdiction the Bankruptcy Court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankruptcy estate . . . Though disallowance of such claims will be ordered where they are fictitious or sham, these cases do not turn on the existence or non-existence of the debt. Rather they involve simply the question of order of payment . . . a sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant . . ."

Turner was president and the directing head of the corporation. He incurred or permitted the wage claims, giving rise to the appellee's claim, to be incurred with full knowledge of its insolvent financial condition. This is demonstrated by the filing of a petition under Chapter XI and testimony at Transcript, pages 52 and 53. He then, to prevent being prosecuted criminally, paid the claims by picking up the dishonored checks. It would be inequitable under all of the circumstances to permit his alleged claims, arising out of wage claims and checks he signed, to participate in this insolvent estate on an equal basis with either labor claimants or general mercantile creditors who extended credit in good faith believing the corporation to be solvent. In addition to the foregoing Turner guaranteed obligations of the corporation [see Tr. p. 48] "or a portion thereof" and caused the corporation to incur the wage claims involved with knowledge that a keeper was in the premises as the result of the action of a creditor [see Tr. p. 53], caused employees

to hold checks and knew that the corporation was in bad financial condition [see Tr. pp. 52-53], and then, with the expectation of recouping his losses, filed Chapter XI proceedings with the expectation of continuing the business [see Petition for Arrangement under Chapter XI, at pp. 3 to 10 of the Transcript], representing therein that there were officers of the corporation and a Board of Directors [see Resolutions at pp. 10 and 11, Tr. of Record], when, in fact, the only officer of the corporation and the only director was Turner himself, Stanley C. Sorenson having become an officer and a director the day of bankruptcy merely for convenience of signing the schedules. [See Tr. of Record, pp. 45 and 46.]

The most recent decision of the California Supreme Court is *Riddell v. Yosemite Creek Co.,* 158 A. C. A. 390, a 1958 decision. In that case the Court found there were dummy shareholders, that the principal personally guaranteed corporate obligations, that the corporate procedure was not followed, and at 398 the necessity of supplying further capital was recognized and an attempt was made to compete with other creditors if the corporation failed. In its conclusion the Court stated that the principal could not justly continue to do business through the instrumentality of the corporations without financing them sufficiently to meet their obligations. Under the circumstances the Court not only finds that advances made while it was recognized that further capital should be supplied to the corporation, would be treated as capital contributions, making an exhaustive review of the law of the State of California in relation to the *alter ego* doctrine and specifically finds that it was not necessary to show actual fraud but enough to show that when there is unity of ownership and unity of interest the recognition of the

corporate identity would foster fraud or promote injustice, and at 393 of the said opinion states that a finding of *alter ego* is particularly the providence of the trial court and that only general rules could be laid down by the Appellate Court.

Later in this brief it will be argued that Turner merely made capital contributions to the bankrupt when he paid the dishonored wage checks and that for this reason the Court would subordinate any claims of Turner.

III.

To Allow Turner to Participate Ahead of General Creditors of the Corporation Would Be Grossly Inequitable.

The case of *Pepper v. Litton, supra,* holds that salary claims in one man corporations may be disallowed where the Court is satisfied that the allowance of the claim would not be fair or equitable to other creditors. This case also holds that officers and directors are in a fiduciary capacity and cannot do indirectly what they could not do directly.

See the case of *In re Burntside Lodge,* 7 Fed. Supp. 785 (D. C.), 26 Am. B. (N. S.) 59, cited with approval.

It is submitted that in the instant case Turner was a fiduciary and was, under the laws of California, criminally responsible for the payment of the wage claims herein, was a one man corporation and had this corporation been his individual business could not have participated as a wage claimant in his own bankruptcy proceedings nor in his own business, yet the effect of the reversing of the Referee's order is to allow Turner's assignee, the appellee, to do just that.

The learned Judge of the District Court based his memorandum decision logically on his conclusion that no inequity

resulted or would result by virtue of the allowance of the claim herein involved. We submit that this simply is not true as at the time of the payment by Turner of the wage checks involved he most certainly had knowledge of the financial condition of his corporation and most certainly paid the checks to avoid criminal prosecution in the Courts of the State of California. The record is clear that he also had the desire to keep his private corporation operating and the hope that he could pull out of the financial chaos which his corporation faced. This is clearly evidenced by the fact that the proceedings were commenced by the filing of a petition for arrangement under Chapter XI of the Bankruptcy Act, rather than by the filing of an ordinary petition in bankruptcy. We submit that it most certainly would not be fair and equitable to the other creditors of this estate to allow Turner, with knowledge of insolvency, on the eve of the filing of Chapter XI proceedings, to rush out and pay a group of wage claimants on dishonored checks of the corporation, checks which he had signed himself personally [see Tr. p. 53] and thus escape criminal liability on the checks and to further do so with the expectation that there was a chance that the corporation ultimately would return his capital investment. Then he assigned the checks at the time of the filing of the Chapter XI proceedings to his attorney, that is, the attorney for the bankrupt corporation and had prior wage status asserted on the basis of his claim, thus permitting his claim to participate prior to general mercantile creditors of the corporation. We further submit that under the circumstances it would also be grossly inequitable to allow the attorney for the bankrupt corporation, the appellee, who accepted the assignment of these so-called wage checks with full knowledge of Turner's relation

to the bankrupt corporation, and who probably participated in the appointment of Sorenson as a director for purposes of executing the Chapter XI petition, to be allowed a prior wage claim as against the general creditors in the estate for fees in connection with this bankruptcy proceeding. To in effect determine his own fee with no review by the Court as to the reasonableness of the fee is in the teeth of the provisions of Section 60d of the Bankruptcy Act which provides that payments either directly or indirectly to the attorney for the bankrupt on account of fees shall be subject to review by the Bankruptcy Court.

Under such a situation the owner of a one man corporation who, in the instant case is not only the owner but the only active managing director of the corporation, could have his cake and eat it, in that he could advance money to his own corporation at any time on behalf of delinquent wages and thus constitute himself a prior wage claimant in his own corporation, even though the moneys were advanced to keep his corporation operating and with a clear expectation that if the business succeeded his capital investment would be returned, and if, on the other hand, the business failed and ran up further obligations, he could then assert prior wage status and recover his advances ahead of other creditors of his corporation. Under such circumstances, one could advance money to his own failing business as a portion of his invested capital, knowing that the business is in a shaky condition, without taking any risk whatever that capital so advanced could be lost. Turner very clearly expected this business to succeed when he filed Chapter XI proceedings. He had hopes of obtaining an additional $60,000.00 capital by the release of certain bushings from the S. C. O. Tool Co. as evidenced by the testimony of his attorney, the claimant

herein, at pages 70 and 71 of the Transcript. We submit that under the circumstances, the Court should look through the form of Turner paying debts of the corporation with his personal funds, disregarding any distinction between the payment of wage checks or any other obligations of the corporation. Stripped of the niceties the corporation needed capital to continue business. Turner, the sole shareholder, sole director, sole officer and managing officer of the corporation and the only person who stood to profit from the success of the business, knew that to continue operations the corporation must have additional capital. He knew there was a keeper in the business and that employees would, of necessity, have to be paid or the business cease operations. He raised personal funds and paid the corporation's delinquent wages thus enabling the corporation to continue business in hopes that he can save his prior investment. We submit that had it been necessary for Turner to pay the rent of the bankrupt corporation or to pay general mercantile creditors in order to secure further supplies for the corporation, no different situation would have existed than was the case with labor claimants. The corporation simply had to have money to continue operations and to give Turner any hope of return on his capital investment.

Turner or his assignee now argues that Turner's payment of wages benefited the creditors as wages would have, in any event, participated ahead of general unsecured creditors and that Turner's claim, therefore, should now be accorded prior wage status ahead of the other creditors. This argument overlooks the fact that had Turner not paid the wages the business probably would have ceased operations immediately and that further claims concerning the lease rentals and equipment, rent, etc. and attor-

ney's fees in connection with the Chapter XI proceedings, receiver's fees in connection with the Chapter XI proceedings and other expenses would not have been incurred by the corporation as the result of Turner's efforts to continue the business. Instead, Turner paid the wage claimants, continued the business in operation, filed a Chapter XI proceeding, incurred on behalf of the corporation the costs of Chapter XI proceedings, the attorney's fees of the claimant, and the costs of a Court appointed receiver [see Tr. p. 12]. We submit that under the circumstances the Referee on the evidence before him committed no error in finding in his Conclusion of Law No. II [see Tr. p. 21] that if Turner had asserted a claim based on the checks in question the claim would have been subordinated in payment and in ordering that the claim be allowed as a general unsecured claim only and in further ordering that the claim be subordinated, basing his said Findings and Order upon the equitable principles enunciated above.

IV.

Turner's Payment of Wage Claims Amounted to a Capital Contribution to the Bankrupt.

A reading of the Memorandum Opinion of the District Court leaves one with the definite opinion that he entirely overlooked the issue regarding whether or not Turner's claim should be subordinated as a capital contribution.

It is submitted that the main reason given in many opinions relating to the subordination of claims hinge on the fact that the funds advanced were capital contributions to the capital of the corporation. (See *Pepper v. Litton, supra;* and *Riddle v. Yosemite Creek Co., supra.*) It is further submitted that for the reasons set forth above these transactions amounted to capital contributions

by Turner and the District Court erred in not considering this issue and in reversing the Referee's Findings which definitely find support in the record and more particularly Conclusion of Law number IV [see Tr. p. 21] which is clearly supported by the fact that Turner's contributions were capital contributions.

V.

Under California Law, Turner Was the Alter Ego of Zipco.

The case of *Riddle v. Yosemite Creek Co., supra,* at 393, holds that a finding of *alter ego* is particularly within the providence of the trial court. The general rule laid down in that case and in the case of *Katenkamp v. Superior Court,* 16 Cal. 2d 696, 108 P. 2d 1, is that if there is unity of ownership and interest "it is not necessary that actual fraud be shown. It is sufficient if a refusal to recognize the identity of the individual with that of the individual would bring about inequitable results." The *Katenkamp* case was cited with approval in *Hudson v. Wylie* (C. C. A. 9, 1957), 242 F. 2d 435, at 442, Petition for Writ of Certiorari denied.

There can be no doubt that Turner was the sole owner of Zipco. See argument and references to the transcript above. Some of the criteria laid down in the *Riddle* case regarding unity of interest are: insufficient capital and knowledge of the same; failure to conform to corporate procedure; personal guarantees of corporate obligations and an attempt to compete with other creditors. (See 396 of the Opinion.)

Here there was a failure to conform with corporate procedures as the record shows that Turner was the only director or officer and that Sorenson was appointed only

for convenience. This was a direct violation of Sections 301 and 800 of the Corporations Code of the State of California providing that a corporation shall have not less than three directors. If Turner was the only officer and director how could Zipco have had shareholder's or director's meetings or for that matter, carried on any business as an entity separate from Turner? Here Turner guaranteed accounts of the bankrupt including the S. C. O. Tool Co. account, a very large account. [See Tr. pp. 48, 70-71.] Here Turner had knowledge that the corporation had insufficient capital as evidenced by the keeper in the premises [See Tr. p. 53], by the filing of Chapter XI proceedings, and by his having loyal employees hold checks. [See Tr. pp. 52-53.] Turner evidenced his intention to compete with other creditors by his assignment of the checks to the claimant and that an inequitable result would be reached by not piercing the corporate veil has been amply demonstrated in the various arguments above.

At pages 35 and 36 of the Transcript may be found the reasoning of the District Court regarding the *alter ego* issue. He relied on *Hollywood Cleaning and Pressing Co. v. Hollywood Laundry Service,* 217 Cal. 124, 17 Pac. 709, a 1932 case decided some eight years prior to the *Katenkamp* case, *supra,* and 26 years prior to the *Riddle* case, *supra,* upon *Norens Realty Co. v. Consolidated A & T Co.,* 80 Cal. App. 2d 879, 182 P. 2d 593, a district court case which is not persuasive in view of the *Katenkamp* and *Riddle* cases decided by the State Supreme Court, and on *Wenban Estate v. Hewlett,* 193 Cal. 675, 696, 227 Pac. 723, 731, a 1924 case superceded by the above referred to later *Katenkamp* and *Riddle* cases. On page 36 he goes on to reason that actual fraud must be shown or bad faith.

The *Katenkamp* case and the *Riddle* case each review the law of California and specifically hold that it is not necessary to show actual fraud and it is sufficient if inequitable results would result from recognizing the corporate identity. See quote, *supra.* It is submitted that the District Court did not follow state law and that the cases he relied upon have been overruled either by implication or directly by the *Katenkamp* and *Riddle* cases and under applicable law the Referee did not err in finding the corporation to be the *alter ego* of Turner.

It follows that if the corporation was a mere *alter ego,* Turner paid his own obligations and the debts were cancelled upon payment and nothing was left to assign to the appellee herein.

VI.

The Door Pump Case Was Not Properly Applied.

At page 37 of the Transcript the District Court cites the case of *In re Door Pump and Mfg. Co.,* 125 F. 2d 610 (C. C. A. 7, 1942), as controlling the issue as to whether Turner could have been a valid assignee of wages. That case considers only bona fide shareholders, makes no consideration of any added facts such as a sole shareholder, officer, manager and director and no such facts appear in that case. It simply does not apply to the situation presented in the instant case and we believe that the District Court overlooked the added facts referred to and thus did not properly consider the issue.

VII.

The Appellee's Claim Is Subject to Review Under Section 60d of the Bankruptcy Act.

Section 60d of the Bankruptcy Act, U. S. Code, Title 11, Chap. 6, Sec. 96, in substance provides that fees paid attorneys for bankrupts either directly or indirectly for services in connection with the bankruptcy proceedings shall be subject to review by the Referee. If *alter ego* doctrine applies it follows that the bankrupt paid the fees and 60d applies.

If the Court sanctions the attorney induced device used herein it is clear that the same will be a prolific breeder of a method to circumvent Section 60d and for attorneys to charge excess fees without court scrutiny. For that reason, if none other, the Court should look upon the appellee's claim with a jaundiced eye.

Conclusion.

The above arguments amply illustrate the errors of the District Court in reversing Referee Rifkind and the District Court's failure to adequately consider issues before the Court. It would be indeed shocking if the owner and manager of a one man corporation or his assignee should be allowed prior wage status ahead of the very trade creditors he created. To sanction the methods herein employed by the appellee would breed a group of subtle evasions to the letter if not the spirit of Section 60d of the Bankruptcy Act relating to Court regulation of fees for attorneys for bankrupt.

For the reasons set forth above it is respectfully urged that the Order of the District Court be reversed and the Order of the Referee affirmed.

Dated: April 24, 1958.

Respectfully submitted,

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No. 15938

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IRVING I. BASS, Trustee in Bankruptcy of Zipco, Inc., a corporation, Bankrupt,

Appellant,

vs.

ROBERT H. SHUTAN,

Appellee.

APPELLEE'S BRIEF.

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No. 15938

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Irving I. Bass, Trustee in Bankruptcy of Zipco, Inc., a corporation, Bankrupt,

Appellant,

vs.

Robert H. Shutan,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

The statement of the case as set forth by Appellant in Appellant's Opening Brief contains certain material inaccuracies of fact which somewhat distort the background of the claim herein, and therefore Appellee deems it necessary to set forth his own Statement of the Case.

This is an appeal from an Order of the District Court, which upon the hearing of the Petition for Review, reversed an Order of the Referee in Bankruptcy disallowing a prior claim asserted by Appellee.

Appellee, within the proper time, filed a priority claim in the within bankruptcy proceedings in the amount of $1531.45, said claim being based upon the ownership by claimant of payroll checks in said amount, being payroll checks of the bankrupt corporation for wages earned

within three months preceding the commencement of the subject bankruptcy proceedings. The verified proof of claim stated that the checks, for full and valuable consideration, were duly assigned to claimant, the Appellee. Exactly one year after said prior wage claim had been filed, the Trustee in bankruptcy filed an objection to said claim. The Trustee alleged on information and belief (1) that in fact no wages were assigned to claimant; (2) that the bankrupt and not the claimant paid the employees (and thereupon the subject checks became the property of the bankrupt who then assigned the checks to the claimant); (3) the Trustee also objected on the ground of lack of consent of the spouse of the wage earner; but counsel for the Trustee stated at the hearing on this matter that such objections appeared only through error in the written objections to claim [Tr. 44], and such objection was abandoned by the Trustee [Tr. 44, 62]; (4) the Trustee's objections stated the further ground that the subject claim was for legal services, was excessive and should be redetermined by the Referee. No other bases of objection was set forth by the Trustee.

Said objections to the subject claim were tried before the Referee on August 8, 1957; and a complete transcript of such trial was a part of the record in the proceeding in the District Court on the Petition for Review, and, of course, is a part of the record on this appeal.

Claimant (Appellee herein) is an attorney at law, with his office in Beverly Hills, California. He has been a member of the bar since 1943 and since 1947 has been specializing in the practice of bankruptcy and insolvency law. [Tr. 63.] Claimant became the holder of the subject payroll checks in the following manner:

The undisputed evidence disclosed and the Referee found that the bankrupt corporation, shortly prior to the commencement of the within proceedings, had issued a number of payroll checks to its employees which checks were either dishonored when presented at the bank or would have been dishonored if presented to the bank, and that Milo M. Turner, an officer, director and sole shareholder of the bankrupt corporation, personally obtained outside funds and used such money to "pick up" said payroll checks, the employees in each case endorsing such checks and delivering them to Milo M. Turner. On or about April 4, 1956 Milo M. Turner transferred and delivered to Appellee the subject checks in payment of a $1500.00 retainer of Appellee for legal services, which retainer had been demanded by Appellee before he would agree to assume the responsibility of becoming counsel for the purpose of representing the corporation in the preparation and filing on behalf of the corporation of a Petition for Arrangement under Chapter XI of the Bankruptcy Act and representing the corporation in the ensuing proceedings. Upon his employment by the corporation on April 4th and the receipt by him of such checks, Appellee did undertake the representation of the corporation and did prepare and file on behalf of the corporation proceedings under Chapter XI of the Bankruptcy Act, and represented the corporation throughout the subsequent debtor and bankruptcy proceedings.

(A most distorted picture of this part of the story is set forth by Appellant on the bottom of page 2 of his Opening Brief herein. Appellant states that the Chapter XI proceeding "proved abortive a few days subsequent to its filing and an Order of Adjudication was made and entered approximately four days after the filing of the

Chapter proceedings". The fact is that the Chapter XI proceeding was filed April 5, 1956; the adjudication in bankruptcy was under date of May 11, 1956 and filed May 15, 1956. [Tr. 13-14.] Other, but less material, inaccurate statements, assumptions and conclusions appear on the same page of Appellant's Brief.)

The Referee found and concluded that the bankrupt corporation is the *alter ego* of Milo M. Turner, that Milo M. Turner is generally liable for the debts of the corporation, that any claim that Milo M. Turner might have against the corporation should be subordinate in payment to the general creditors, and that Appellee as an assignee from Milo M. Turner, stands in no better position than Turner would in connection with the subject payroll checks; and on that basis the Referee allowed the subject claim in the amount of $1531.45 as a general unsecured claim only and further ordered and directed that said claim be subordinated in payment to the payment of all other general unsecured claims in the subject bankruptcy proceeding.

The Referee further concluded that the fee of Appellee was subject to determination and review by the Court under the provisions of Section 60d of the Bankruptcy Act, 11 U. S. Code, Chapter 6, Section 96d.

Appellee petitioned for a review of said Order of the Referee and said Petition for Review was heard and determined by the Honorable Irving R. Kaufman, District Judge. The District Court made an Order setting aside the Referee's Order and directing that Appellee's claim in the amount of $1531.45 should be accorded priority status and allowed as a prior claim in said amount. The District Court, adopting rather than disregarding the Referee's Findings of Fact, found error in the Referee's

conclusion that the bankrupt corporation is to be regarded as the *alter ego* of Milo M. Turner. The District Court concluded that the assignment of the wage claims was proper, valid and enforceable in the hands of Appellee. The District Court further found that as the payment to Appellee did not involve funds of the corporation, the Referee's determination that the attorney's fee is subject to review under Section 60d was erroneous. The analysis and conclusions of the District Judge are clearly set forth in his written opinion on file herein. [Tr. 33-39.]

The Trustee in bankruptcy, aggrieved by the Order of the "visiting Judge from New York" has filed this appeal which, in effect, asserts that the Referee was correct in the first place and that the District Court was in error in saying that the Referee erred.

Issues on Appeal.

The most basic issue in this matter is whether the Referee in bankruptcy properly concluded that the bankrupt corporation was the *alter ego* of Milo M. Turner at the time that Milo M. Turner paid cash for and took assignments of the subject payroll checks. The other issues as to the validity of the assignments of the wage claims and the question of whether the fee for legal services was paid from funds of the bankrupt corporation really turn upon a resolution of the first stated issue. If Milo M. Turner was not the *alter ego* of the corporation, then it must follow that the funds transferred to the employees in consideration of the assignment of their payroll checks were not funds of the corporation. The assignment of the wage claims would be clearly valid; and the question of review of legal fees under Section 60d would be irrelevant.

In the Appellant's Opening Brief (pp. 6-7) Appellant seeks to inject an issue which was never put into issue by the pleadings nor at the trial of the matter below: Appellant now asserts that the payments by Milo M. Turner to the wage claimants, "irrespective of equitable theory or *alter ego*", "amounted to capital contributions to the capital structure of the corporation and therefore cancelled such wage claims as against the corporation." (App. Br. p. 6.) This proposition is again asserted by Appellant in his "Summary of Argument" on page 7 of his brief where Appellant now assumes further that the corporation was "insolvent" at the time of the subject payments. Never before in this controversy was there an assertion that the corporation was insolvent at the time of the payments nor was there any testimony on this regard at the trial. The distortions, unwarranted assumptions and efforts to inject new issues may reflect Appellant's present awareness of the inadequacy of the trial record to support the conclusions of the Referee.

There is not at issue on this appeal the question or proposition that the Reviewing Court should accept as correct the Referee's Findings of Fact unless such Findings are clearly erroneous. Not only does this Appellee recognize the validity of such rule but the District Court below recognized such rule, and did not set aside the Referee's Findings of Fact. [See District Court's Opinion, Tr. 35.]

ARGUMENT.

I.

The District Court Was Correct in Disregarding the Conclusions Drawn by the Referee From the Facts as Found.

Appellant has no quarrel with the well-settled rule that the District Court should accept the Referee's Findings of Fact unless such Findings are clearly erroneous. However, the corollary to that rule is that if there is no substantial evidence to support it, the Referee's Findings will not be sustained.

In re Collins (S. C. Cal.), 141 Fed. Supp. 25.

It is equally clear that the designation as "Findings of Fact" of what in reality are Conclusions of Law, will not operate to limit the reviewing power of the higher Court.

In the instant case the Referee was not presented with any problems of contradictory witnesses or substantially conflicting testimony or evidence. The Referee did not have to weigh the credibility of one witness against the credibility of another. There are no substantial factual conflicts in the evidence presented to the Court. The issues herein arise upon the inferences and conclusions reached by the Referee from the evidence.

Such inferences and conclusions are not conclusive upon the reviewing Court; just as in other situations, the trier of fact should resolve disputed issues of fact, but questions of policy and limitations upon the privilege of incorporation are ultimately for the Appellate Courts to determine.

Ballantine, *Corporations: "Disregarding The Corporate Entity" As A Regulatory Process,* 31 Cal. Law Review 426;

Schifferman, *The Alter Ego,* 32 Cal. State Bar Jour. 143.

II.

The District Court Was Correct in Holding That the Evidence Presented Before the Referee Totally Failed to Support the Conclusion That Milo M. Turner Is the Alter Ego of the Bankrupt Corporation.

The Trustee in bankruptcy, Appellant herein, totally failed in the trial before the Referee in bankruptcy to present evidence of facts which would support a conclusion that the bankrupt corporation should be regarded as the *alter ego* of Milo M. Turner.

> ". . . it is incumbent upon the one seeking to pierce the corporate veil to show by evidence that the financial setup of the corporation is just a sham and accomplishes injustice."
>
> *Carlisimo v. Schwebel,* 87 Cal. App. 2d 482, 197 P. 2d 167.

The conditions under which the corporate entity may be disregarded, or the corporation regarded as the *alter ego of* the stockholder have been summarized in a number of California cases. In *Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service,* 217 Cal. 124, 17 P. 2d 709, the rules are summarized as follows in 217 Cal. at page 129, 17 P. 2d p. 711:

> "Whatever may be the rule in other jurisdictions, the rule is well settled in this state that the mere fact one or two individuals or corporations own all of the stock of another corporation is not of itself sufficient to cause the courts to disregard the corporate entity of the last corporation and to treat it as the *alter ego* of the individual or corporation that owns its stock. In addition it must be shown that there is such a unity of interest and ownership that the individuality

of such corporation and the owners or owners of its stock has ceased; and it must further appear that the observance of the fiction of separate existence would, under the circumstances, sanction a fraud or promote injustice. Bad faith in one form or another must be shown before the Court may disregard the fiction of separate corporate existence."

In *Norins Realty Company v. Consolidated A & T Co.*, (1947), 80 Cal. App. 2d 879, 182 P. 2d 593, the Court held that the allegations of the complaint were insufficient to support a cause of action by a creditor to disregard the corporate entity and support a judgment against the individual defendants. The Court stated that:

"Mere ownership of all the stock and control and management of a corporation by one or two individuals is not of itself sufficient to cause the Courts to disregard the corporate entity."

In the *Norins Realty* case the plaintiffs, attacking the corporate entity, were demurred out of Court, though their complaint alleged substantially more on the subject than the Trustee produced herein by way of evidence.

It is pertinent to relate the general and accepted rules on the question of disregarding the corporate entity to the evidence presented by the Trustee at the trial below. A study of the entire transcript of the hearing in this matter discloses the following as the total evidence on the point in question:

(1) Immediately prior to the bankruptcy, Turner was the only *active* officer in Zipco, Inc. the bankrupt corporation. [Tr. 45-46.]

(2) Turner was the sole shareholder of Zipco, Inc. [Tr. 46.]

(3) Turner gave personal guarantees to two or three creditors of Zipco, Inc. [Tr. 48.]

(4) Turner was the "responsible" officer of the corporation. [Tr. 53.]

Turner was the sole shareholder of the bankrupt corporation, and the inference is fair, as in any similar situation, that his was substantially the controlling voice in the affairs of the corporation. The mere fact that all of the corporate stock is held by one person and that said person exercises control over the corporation has never been regarded as sufficient to justify disregarding the separate corporate entity. There is absolutely no evidence of improper domination by Turner. There is no evidence that the corporation was the instrumentality of Turner for his individual use and benefit. There is no evidence that a failure to pierce the corporate veil would sanction fraud or promote injustice.

On the basis of the record in this case, the District Court had no choice but to hold that the Referee committed error in concluding that the evidence presented at the hearing supported a conclusion that Milo M. Turner was the alter ego of the bankrupt corporation.

Appellee, in his petition on review to the District Court herein, had complained of other errors on the part of the Referee which the District Court, because of its holding on the major points, apparently did not feel it necessary to cover in its opinion. Yet it should be here noted that it has been the position of Appellee ever since the opening of the hearing before the Referee that it was error for the Referee to admit into evidence, over the continuing

objection of Appellee, testimony relating to the question of whether the bankrupt corporation was the *alter ego* of Milo M. Turner.

The Trustee's written objections to the claim in this proceeding gave claimant no indication whatsoever that at the hearing on such objection he would be faced with the legal proposition that Milo M. Turner was the *alter ego* of the bankrupt corporation and that upon such basis the claimant's assignor (Turner) could not file such prior claim based upon the assigned payroll checks. The Trustee did not disclose this basic theory until he commenced, at the hearing herein, the examination of his first witness Milo M. Turner. [See Tr. 46-48.] As indicated in the transcript claimant immediately and fully presented his objection to such line of questioning, which objection was overruled by the Referee. After waiting a full twelve months to file objections to a priority claim, a Trustee in bankruptcy has a minimum duty of advising the claimant the real basis of his objections to the claim. While the Trustee's objection stated a number of bases for the objection, the real objection—the one upon which the Trustee relied and upon which the Referee based his Findings and Conclusion, is the one objection totally omitted from the Notice of Hearing of Objections given to claimant herein.

It is fundamental that evidence must be relevant to the issues in a case before it can be admitted. While the District Court held that the subject testimony was inadequate to support the conclusion of *alter ego,* it should further be noted that the Referee's erroneous conclusion was in itself based upon improperly admitted testimony.

III.

Assignment of Wage Claims.

A. Any Claim for Wages Earned Within Three Months Preceding Bankruptcy That Is Entitled to Priority Under the Provisions of Section 64a (2) May Be Freely Assigned and Will Carry With It Into the Hands of the Assignee the Same Priority It Had in the Hands of Its Original Owner.

This matter is discussed in 3 Collier on Bankruptcy (14th Ed.), pages 2096 and 2097.

The above doctrine was first laid down by the United States Supreme Court in 1907 in the case of *Shropshire Woodliff and Co. v. Bush,* 204 U. S. 186, 27 S. Ct. 178, 51 L. Ed. 436. In upholding a prior wage claim in the hand of an assignee the Supreme Court stated:

> "When one has incurred a debt for wages due to workmen, clerks, or servants, that debt, within the limits of time and amount prescribed by the act, is entitled to priority of payment. The priority is attached to the debt, and not to the person of the creditor; to the claim, and not to the claimant. The act does not enumerate classes of creditors and confer upon them the privilege of priority and payment, but, on the other hand, enumerates classes of debts as 'the debts to have priority' ".

B. The Assignment of a Wage Claim to Stockholder of a Bankrupt Corporation Is Valid and Enforceable As a Prior Wage Claim.

The Court of Appeals for the Seventh Circuit had the occasion in 1942 to deal directly with issue presented where prior wage claims were filed in the bankruptcy proceeding of a corporation by a group of stockholders of the bankrupt corporation, said claims having been assigned to the

stockholders by certain of the employees. (*In re Dorr Pump and Mfg. Co.* (CCA 7-1942), 125 F. 2d 610.)

The *Dorr* case arose in Wisconsin, where after bankruptcy, some of the employees of the bankrupt corporation were threatening to file suit against certain stockholders on the basis of individual liability of the stockholders for wages, pursuant to Wisconsin law. A group of the stockholders made payment to the employees of the amount of their claims for services and at the same time took an assignment of such wage claims. The stockholders then filed such assignments as prior wage claims against the corporation in the bankruptcy proceedings. The claims were allowed as priority claims and the Trustee appealed. The Trustee contended that since the debt to the employees was paid, there was nothing to assign, and further that the payment to the employees was the discharge of a primary obligation of the stockholders and there could be no subrogation of the stockholders to the rights of the wage earner.

The Circuit Court affirmed the allowance of such claims and held that the legal effect of the payment to the employees of the money and their receipt of the assignment was not to extinguish the debt but to assign it to the stockholders, and that such assignment was valid. The fact that the stockholders, under Wisconsin law, had a personal liability to the wage earners, did not deter the Court from its conclusion. The Court noted that the stockholders owed nothing to the corporation or to its non-wage earning creditors under such law. Such statute was obviously for the benefit of the wage earners and "not for the purpose of creating additional assets or credits to which other creditors had a right to look." (At page 611.)

Appellant's arguments on the matter of assignment of wage claims and also on the subject of *alter ego* include the presentment of material facts not in evidence and the drawing of inferences from such "facts". This, in connection also with question-begging argument has a tendency to lead the discussion of issues off the pertinent track. Throughout Appellant's Opening Brief he makes reference to the corporation's "insolvency", refers to Turner's "full knowledge of its insolvent financial condition" (App. Br. p. 11) and generally discusses the bringing in of outside cash by Turner for the payment of payroll checks of the corporation's employees as though it were a dastardly deed done with the most evil of intent and with the design of making some profit from such act as against the creditors of the corporation. It was indeed obvious that the corporation was in a poor cash position at the time in question, not being able to meet its payroll. However, nowhere during the hearing was there testimony to the effect that the corporation was insolvent. On the contrary the only testimony relating to assets and liabilities was a reference to a balance sheet of February 29, 1956 which indicated a solvent condition showing total assets of $244,526.14 and total liabilities of $204,-324.00. [Tr. 69.]

The uncontradicted testimony at the trial of this matter presents the following "sinister" background of the transfer by Turner to Appellee of the subject wage checks: Turner, identifying himself as President and major shareholder of the corporation, came to Shutan somewhere around April 1, 1956 having been recommended to the latter as a specialist in insolvency and Chapter XI proceedings. In the initial discussion of the corporate problems the matter of a cash advance payment as a retainer

to Shutan for his legal services was discussed. A figure of $1500.00 was arrived at. Turner stated that the corporation was short of cash but that he would try to raise the money from personal and private resources. [Testimony of Milo M. Turner, Tr. 50; testimony of Robert H. Shutan, Tr. 64.] Turner did raise a sufficient amount of cash from personal sources, but was disturbed about the outstanding unpaid payroll checks. Turner took this cash and "picked up" the subject payroll checks, getting endorsements from the employees. Turner then prevailed upon Appellee to take an assignment of the subject payroll checks, in lieu of the actual cash, as the required retainer. On April 4, 1956 subject checks were transferred and assigned by Turner to Shutan and Turner signed a written assignment of same [Claimant's Ex. No. 1, Tr. 55], in which Turner represented that each of the employees had been paid the full face amount of such check and has endorsed such check in consideration for the payment and that none of the moneys used in the payment of said checks constituted funds of the corporation but on the contrary that all of said checks were paid from Turner's personal funds. Thereupon, Appellee assumed the responsibility of representing the subject corporation (which appeared to have assets of almost a quarter of a million dollars and liabilities of approximately $204,000.00) and guiding such corporation through a Plan of Arrangement under Chapter XI of the Bankruptcy Act. Appellee, in his testimony before the Referee, summarized the services which he thereupon rendered on behalf of the corporation. [Tr. 66-78.] Appellee takes personal umbrage at the remarks of Appellant appearing at the bottom of page 14 and the top of page 15 of Appellant's Opening Brief, which remarks seek vaguely to imply some participation by Appellee with Mr. Turner

in something less than a completely proper activity. The uncontradicted record demonstrates that Turner and the corporation were utter strangers to Appellee until the occasion of the subject employment of Appellee as counsel.

Appellant's discussion of Section 60d of the Bankruptcy Act completely begs the question herein. The reference to an "attorney induced device" . . . "to circumvent Section 60d" is as unjustified as it is illogical.

When before the District Court (as here also), Appellant raised the question of whether allowance of the claim would indicate approval and sanction an undesirable method of obtaining attorney fees. This question can be answered by another question: Is it inequitable or in anyway improper for an attorney, with no previous contact with or obligation to a prospective client, to say to that client, "Though it is the firm policy of my office to require a cash retainer before assuming the responsibility of representing a debtor in Chapter XI proceedings, it will be acceptable to me for you to take the cash you have raised personally and use it to pick up payroll checks of your corporation's employees; I will accept assignments of such payroll checks and wait, instead of the employees, for the payment out of the debtor proceeding."?

If Appellee received funds of the bankrupt corporation as the retainer fee for the legal services in the preparation and filing of the Chapter XI proceedings there is no question but that such fee is subject to review by the Referee under Section 60d. It is just as simple as stating it. No fees will be charged a prospective debtor or bankrupt and paid for out of the assets of said debtor or bankrupt without creditor protection and court scrutiny. On the other hand, if the funds used to employ counsel

do not come from the bankrupt, either directly or indirectly, Section 60d simply does not apply.

Appellant, in his argument on page 13 of Appellant's Opening Brief, argues that Turner because of his relationship to the bankrupt corporation (and Appellant further assuming the *alter ego* theory) could not have successfully filed a prior wage claim in the bankruptcy proceeding for his own services to the corporation—and then Appellant extends this even further to conclude that therefore certainly Turner couldn't have successfully filed the subject prior wage claims in this proceeding. Aside from the false assumptions, the argument illustrates Appellant's complete failure to distinguish between a "wage claimant" and an "assignee of a wage claim". It is quite conceivable that there would be situations where an officer-director-shareholder of a bankrupt corporation would be denied priority on a claim filed for his own salary; yet this again has nothing to do with the rights of an otherwise valid prior wage claim filed by an officer of the corporation as an assignee of said claim. See *Dorr Pump and Mfg. Co., supra,* 125 F. 2d 610.

Conclusion.

If the moneys used to pay the subject payroll checks were not funds of the bankrupt corporation then all of the arguments of Appellant fall assunder. On what basis can Appellant show that the funds were those of the corporation?

1. That the subject funds came directly or indirectly from the corporation's cash or other corporate assets? The Trustee in bankruptcy, Appellant herein, never even attempted to show this. There is no evidence of any kind whatsoever to indicate the affirmative on this question.

2. That Milo M. Turner was the *alter ego* of the bankrupt corporation and that therefore Milo M. Turner's funds, used herein, were the same as the corporate funds? The District Court was clearly correct that the evidence presented at the trial of this matter before the Referee, and the facts as found by the Referee, cannot support the conclusion that Milo M. Turner was the *alter ego* of the bankrupt corporation.

It follows therefore that claimant (Appellee) holds a valid assignment of an enforceable prior wage claim and is entitled to have such prior wage claim allowed as such in this proceeding.

It also follows that the District Judge was correct in holding that, as the assignment to claimant of said wage claims did not involve funds of the corporation, such attorney's fee is not subject to review by the Court under Section 60d.

It is therefore submitted that the Order of the District Court should be affirmed in all respects.

Respectfully submitted,

Robert H. Shutan,

Attorney for Appellee.

No. 15,940

United States Court of Appeals
For the Ninth Circuit

Otis, McAllister & Co., a corporation,
Appellant,

vs.

Skibs, A/S Marie Bakke,
Appellee.

APPELLANT'S OPENING BRIEF.

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Cases

Cases	Pages
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St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral, 263 U.S. 119, 44 S. Ct. 30, 68 L. ed 201	5
Smith v. The Ferncliff, 306 U.S. 444, 59 S. Ct. 615, 83 L. ed 862 (1939)	15
Thompson v. Riggs, 5 Wall. (U.S.) 663, 18 L. ed. 704	24
Ullrich v. State, 186 Md. 353, 46 Atl. 2d 637	24
United States v. Farr Sugar Corp., 191 F. 2d 370, affd. 343 U.S. 236, 72 S. Ct. 666, 96 L. ed 907	21
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Texts

Gilmore and Black: The Law of Admiralty (1957), p. 167 22

Knauth: The American Law of Ocean Bills of Lading, 4th ed. 1953; pp. 118-131 16

Williston on Contracts, Revised Edition (1936), Vol. 3, p. 1890 24

No. 15,940

United States Court of Appeals

For the Ninth Circuit

Otis, McAllister & Co., a corporation,
Appellant,

vs.

Skibs, A/S Marie Bakke,
Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal to the United States Court of Appeals for the Ninth Circuit from a final admiralty decree of the United States District Court for the Northern District of California, Southern Division, made and entered on December 4, 1957 (Tr. 46). Notice of appeal was filed February 27, 1958 (Tr. 47), within the ninety day period fixed by section 2107 of Title 28, U.S. Code.

The action was commenced on the admiralty side of the District Court by a libel *in rem* and *in personam,* (Tr. 3) filed by appellant, to recover for damage suffered during transit by a shipment of coffee which appellee had agreed to carry on board its vessel from Peru to San Francisco. The admiralty jurisdiction of the District Court is founded on Art. III, sec. 2, of the United States Constitution and sec. 1333 (1) of Title 28, U. S. Code.

The appellate jurisdiction of the Court of Appeals for the Ninth Circuit is granted by the same section of the Constitution and by sections 41, 1291 and 1294 of Title 28, U. S. Code.

STATEMENT OF THE CASE.

This case involves the sole issue of the proper measure of damages for loss and/or damage to cargo shipped under an ocean bill of lading subject to the Carriage of Goods by Sea Act, sections 1300-1315 of Title 46, U. S. Code. The case was tried on an agreed statement of facts, and there are no factual issues or conflicts of testimony to be resolved.

Appellee, as a common carrier of goods for hire, received a shipment of coffee in good order and condition at Callao, Peru, issued its bill of lading therefor, and agreed to carry the coffee on its vessel MARIE BAKKE to San Francisco and to deliver it there in the same good order and condition as when received. Upon the arrival of the vessel at San Francisco appellee failed to deliver 162 pounds of the shipment and delivered 71,097 pounds thereof in a damaged condition due to contamination by a foreign substance during transit. Appellant was the owner of the coffee during the voyage and was entitled to bring an action for the damage and loss which resulted.

The damaged coffee was reconditioned at a cost of $1,117.80 and was thereafter sold for $31,468.62, both amounts being reasonable. The F.O.B. invoice value of the coffee in question, plus freight and insurance, was $00.4976 per pound, while the sound market value of

similar coffee, at the time and place of delivery, was $00.5475 per pound. Appellee admitted liability but reserved the right to try the issue of whether appellant's damages should be computed with reference to invoice value or market value.

All of the foregoing facts appear in the agreed statement (Tr. 31) and were so found by the District Court (Tr. 40).

In the Court below appellee claimed that its liability should be limited to invoice value by virtue of clause 18 in its bill of lading, and also by reason of an alleged custom in the trade. The bill of lading is reproduced in full as an exhibit to the agreed statement (Tr. 36), and clause 18, the so-called "invoice value clause", is set forth in the answer (Tr. 9), the agreed statement (Tr. 33), and in Finding VII (Tr. 43). The alleged custom is set forth in the amendment to answer (Tr. 11).

Appellant took the position that the Carriage of Goods by Sea Act prohibited any clause, "agreement", or other device seeking to limit or restrict recovery for cargo damage other than as expressly sanctioned by the Act. It filed exceptions to the answer and amendment to answer (Tr. 28) seeking to have both the bill of lading defense and the custom defense stricken. The District Court overruled the exceptions (Tr. 30) and the case proceeded to trial on the agreed statement. The trial Court followed the prior ruling on exceptions, held the invoice value clause valid, and ordered a decree based upon invoice value (Tr. 39). Conclusion V expressly stated that no determination was made on either the existence or validity of the alleged custom (Tr. 45).

The issue on this appeal is whether a common carrier subject to the Carriage of Goods by Sea Act may utilize an invoice value clause to reduce its liability to an amount less than the actual damages suffered, as measured by the traditional rule of market value. Appellee maintains that any such clause is valid so long as it is a "true valuation clause." Appellant contends that no such clause is valid, regardless of how it is phrased or what it is called, since it is not expressly sanctioned by the Act. Recent trial court decisions by the District Court in New York and the Exchequer Court of Canada have held invoice value clauses invalid on the grounds advanced by appellant. No reported decision of any court (except that of the District Court herein) has upheld the validity of such a clause under the Carriage of Goods by Sea Act. There being no prior appellate decision on the precise point involved, the decision of this Honorable Court will be of great importance to everyone connected with the shipment and carriage of merchandise to and from United States ports in foreign commerce.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In holding that clause 18 of the bill of lading does not contravene Section 3(8) or any other provision of the United States Carriage of Goods by Sea Act, 1936;

2. In holding that appellant's damages are to be measured in accordance with clause 18 of appellee's bill of lading;

3. In failing to hold that the invoice value clause in appellee's bill of lading (clause 18) is invalid under the provisions of the United States Carriage of Goods by Sea Act, 1936;

4. In failing to measure and determine appellant's damages on the basis of the sound market value of the shipment at destination.

ARGUMENT.

Appellee delivered contaminated coffee to appellant in San Francisco, thereby breaching its duty to carry the shipment safely, and becoming liable in damages for appellant's loss. In the absence of any valid contractual stipulation to the contrary, those damages are to be computed by comparing the damaged value with the value which the goods would have had on the market at destination had they arrived in sound condition.

> *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral,* 263 U.S. 119, 44 S. Ct. 30, 68 L. ed. 201;
> *H. Liebes & Co. v. Klengenberg,* 23 F. 2d 611 (9th Cir.);
> *United S.S. Co. v. Haskins,* 181 Fed. 962 (9th Cir.);
> *Northern Commercial Co. v. Lindblom,* 162 Fed. 250 (9th Cir.).

Under the foregoing rule appellant's damages are $8,663.49, computed as follows:

Sound market value of 71,097 lbs. @ .5475	$38,925.61
Less gross salvage return	31,468.62
	$ 7,456.99
Plus reconditioning expense	1,117.80
Plus 162 lbs. non delivered @ .5475	88.70
Total	$ 8,663.49

The District Court, however, ruled that Clause 18 of appellee's bill of lading, providing for an "agreed value" equal to shipper's invoice plus freight, insurance and duties, was a valid stipulation for a substitute measure. Damages of only $5,107.66 were awarded, computed in accordance with the clause:

71,097 lbs. @ .4976	$35,377.87
Less gross salvage return	31,468.62
	$ 3,909.25
Plus reconditioning expense	1,117.80
Plus 162 lbs. non-delivered @ .4976	80.61
Total	$ 5,107.66

(The factors used in the above computations are taken from Findings IV, V, VIII and IX.)

Appellant will demonstrate that it was clear error on the part of the District Court to give any effect to the invoice value clause. The Carriage of Goods by Sea Act expressly prohibits any clause lessening the carrier's liability for loss or damage otherwise than as provided therein. Since invoice value clauses are not provided for

in the Act, they cannot be given effect, when to do so would be to lessen the carrier's liability.

I.

THE STATUTORY REGULATION OF BILLS OF LADING IN FOREIGN COMMERCE.

From 1893 until 1936 the liability of common carriers by water was regulated by the Harter Act, 46 U. S. Code secs. 190 et seq. In 1936 the Harter Act was superseded in foreign trade by the Carriage of Goods by Sea Act, 46 U. S. Code, secs. 1300 et seq. In general, "true valuation clauses" were valid under the Harter Act. Their validity under the Carriage of Goods by Sea Act is the issue on this appeal.

The District Court ruled, in effect, that the 1936 Act had made no change in this area of bill of lading law, and that a valuation clause valid prior to 1936 continues to be good today. In order to understand the error in that ruling it is necessary to compare the relevant portions of the two statutes.

A. The Carriage of Goods by Sea Act expressly prohibits clauses which "lessen" carrier's liability to cargo.

The 1936 Act, hereinafter termed "Cogsa" for convenience, applies to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade (46 U.S.C.A. Sec. 1312). It defines not only the substantive rights and obligations of the parties to such contracts, but also the extent to which the contract itself

can prescribe the measure of damages for breach of those rights and obligations. The following sections, which allow certain limitations but forbid all others, condemn the clause upheld by the District Court:

> Section 4(5): "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.
>
> "By agreement between the carrier, master, or agent of the carrier, and the shipper, another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained." (46 U.S.C.A. Sec. 1304(5).)
>
> *　　*　　*　　*　　*　　*　　*
>
> Section 3(8): "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect." (46 U.S.C.A. Sec. 1303(8).)

The commands of the statute are plain. "The amount of damage actually sustained," determined by traditional rules of damages in carrier cases, is to be the basic measure, subject to a limit of $500 per package on high value shipments. By agreement, the parties may fix a higher limit per package than $500, but not a lower one. Any clause otherwise lessening carrier's liability, such as appellee's "invoice value" clause, is null and void.

Section 3(8) is the key to the true meaning of Cogsa. Its effect is twofold. On the one hand it prohibits clauses "*relieving*" the carrier from liability. Such a clause might read: "not responsible for damage to goods caused by contact with other cargo." In addition, it prohibits clauses "*lessening* such liability otherwise than as provided in this chapter." The invoice value clause is an example of such a clause, since it lessens appellee's liability below what it would otherwise be. It is this double-barreled effect of 3(8) which distinguishes it from parallel sections of the Harter Act, and which renders cases decided under the Harter Act meaningless as authority on valuation clauses in bills of lading governed by Cogsa.

B. The Harter Act contains no reference to clauses lessening the carrier's liability.

Section 1 of the Harter Act (46 U.S. Code sec. 190) provides as follows:

> "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause,

> covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.''

The foregoing section applies only to clauses whereby the carrier ''shall be *relieved* from liability.'' It says nothing about clauses *lessening* such liability. The only use of the verb ''lessen'' in the Harter Act appears in Section 2 (46 U.S. Code sec. 191), which invalidates any covenant or agreement whereby the ''obligations'' of the carrier to furnish a seaworthy vessel or to care for her cargo ''shall in any wise be lessened, weakened, or avoided.''

There is a clear difference between lessening an *obligation* and lessening a *liability.* An obligation is a duty; a liability is the result of a breach of that duty. Until a duty is breached no liability can exist. To lessen an obligation, therefore, is to ''relieve from liability'', for it prevents certain liabilities from ever arising. Sections 1 and 2 of the Harter Act, like the first part of Cogsa 3(8), preserve the underlying obligations of the carrier and prohibit clauses which lessen those obligations or (which is the same thing) which relieve the carrier from liability for a breach thereof. Unlike section 3(8) of Cogsa, however, there is nothing in the Harter Act prohibiting clauses which *lessen* the carrier's *liability,* and for that reason certain valuation clauses were upheld in Harter Act litigation.

II.

THE PHRASE "LESSENING SUCH LIABILITY" MEANS LESSENING THE DOLLAR AMOUNT THEREOF.

There is only one way to measure a carrier's liability, and that is by the amount of money (or other recompense) which must be paid to the damaged cargo claimant. It follows that a lessening of that liability must refer to a reduction in the amount of money the carrier has to pay, a proposition which is confirmed by cases arising under both the Harter Act and Cogsa.

In *Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494, 55 S. Ct. 483, 79 L. ed. 1016 (1935), the Supreme Court had occasion to distinguish between "limitation" clauses, which were valid under the Harter Act only if a choice of rates were offered to the shipper, and "valuation" clauses, which were upheld under the Harter Act regardless of rates.

In essence, the Court defined a limitation clause as one which placed a ceiling on the carrier's liability, so that it could operate only to the carrier's advantage, and a "valuation" clause as one which stated an agreed value and could therefore benefit either party to the contract, depending upon whether the actual value was greater or less. The refinements of the distinction are of only historical interest, since neither type of clause is valid today unless expressly sanctioned by Cogsa. The important thing about the *Ansaldo San Giorgio* decision is that, in defining a "true valuation clause," the Court used language almost identical with that which Congress later used in describing the type of clause prohibited by Cogsa:

"The other is a true valuation clause. It is to the effect that in event of loss or damage for which the carrier is liable, the same shall be computed on the basis of the value of the goods at the place and time of shipment. Such a provision may benefit the shipper if the goods depreciate prior to the time for delivery by the carrier, *and may lessen the carrier's normal liability* if they should appreciate prior to that time." (294 U.S. at 497, 55 S. Ct. at 485, 79 L. ed. at 1020) (Emphasis added).

In describing a true valuation clause as one which might "lessen" the carrier's liability, the Supreme Court plainly was referring to the dollar amount of such liability. The subject under discussion was the measure of damages, not the nature of the carrier's underlying obligations to cargo. It must be assumed that when Congress enacted the Carriage of Goods by Sea Act, just one year later, it was using those words in the same sense in prohibiting a clause "lessening such liability."

The Court of Appeals for the Second Circuit, in *Pan-Am Trade & Credit Corp. v. The Campfire,* 156 F. 2d 603 (1946), cert. den. 329 U.S. 774, 91 L. ed. 666, 67 S. Ct. 194, construed Cogsa as invalidating a clause which reduced the dollar amount of carrier liability otherwise than as authorized by the Act. The case involved a "pro-rata" clause, providing that carrier's liability should be determined on the basis of $500 per package "or pro-rata in case of partial loss." A partial loss having occurred in the amount of $676.94, the issue was whether the carrier was liable for the full $500 or for only a proportion thereof in accordance with the pro-rata clause. Cargo claimants argued that the clause was void as one

which "lessened" liability in a manner not authorized by the Act. The District Court agreed, held the clause void (64 F. Supp. 179), and that holding was affirmed on appeal:

> "The appellants argue that section 4(5) of the Carriage of Goods by Sea Act, 46 U.S.C.A. § 1304(5), printed in the margin, states only a maximum recovery for the loss of goods whose value the shipper has not declared, thus leaving the parties free to contract with respect to a lesser recovery; . . . The argument that the statute prescribes only a maximum recovery is met by section 3(8), 46 U.S.C.A. Sec. 1303(8), printed in the margin, which invalidates any clause 'lessening' the carrier's liability 'otherwise than as provided in this chapter.' Under section 4(5) the general rule for measuring the carrier's liability for 'any' loss is the 'amount of damage actually sustained,' but not to exceed $500 per package unless the shipper has declared the value of the goods before shipment. We agree with the district judge that to give effect to the pro-rata clause would 'lessen' the carrier's liability in a manner not authorized by any provision of 'this chapter.'" (156 F. 2d at pp. 604-605).

The meaning of the phrase "lessening such liability" was passed on again early this year in *Gulf Italia Co. v. S.S. Exiria,* 1958 A.M.C. 439 (S.D.N.Y. 1958), which involved the measure of a carrier's liability for damage to an unboxed tractor. Although the tractor was not in fact a "package", the carrier argued that the parties to the bill of lading had described it as such, and that therefore it should be deemed a package so as to limit the carrier's liability to $500 under section 4(5) of Cogsa.

On this point the Court referred to *Pan-Am Trade & Credit Corp. v. The Campfire, supra,* p. 12, and said (1958 A.M.C. at p. 442):

> ". . . the holding in that case is clear that any attempt to lessen the carrier's liability, other than by the terms of the Act, is invalid. To allow the parties themselves to define what a 'package' is would allow a lessening of liability other than by the terms of the Act. . . ."

A year before the Carriage of Goods by Sea Act was passed, the Supreme Court described a valuation clause as one which might lessen carrier's liability, using that phrase to refer to the measure of damages (*Ansaldo San Giorgio I v. Rheinstrom Bros. Co., supra,* p. 11). After Cogsa went into effect, it was established that the lessening of liability prohibited by section 3(8) also refers to the measure of damages (*Pan-Am Trade & Credit Corp. v. The Campfire, supra,* p. 12; *Gulf Italia Co. v. S.S. Exiria, supra,* p. 13). It is, therefore, logically inescapable that appellee's invoice value clause, or any other clause not expressly provided for in Cogsa, is invalid thereunder when the effect of its application would be to reduce the amount of the cargo owner's recovery.

III.

THE AUTHORITIES ESTABLISH THE INVALIDITY OF THE INVOICE VALUE CLAUSE.

Before examining the authorities on the present validity of invoice value clauses, it will be helpful to look at the

comment appearing in *Smith v. The Ferncliff,* 306 U.S. 444, 59 S. Ct. 615, 83 L. ed. 862 (1939). The case is important because, although it involved the validity of an invoice value clause in a Harter Act bill of lading, it did not reach the Courts until after the passage of Cogsa. The following language, appearing in the opinions of both the District Court (22 F. Supp. at pp. 742-743), and the Supreme Court (306 U.S. at p. 450, 59 S. Ct. at p. 617, 83 L. ed. at p. 866) shows recognition of the fact that the new Act had changed the law on valuation clauses:

> "The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act. . . ."

The extent of Cogsa regulation, and its effect on an invoice value clause almost identical to the one involved here, were laid down in *The Harry Culbreath,* 1952 A.M.C. 1170 (S.D.N.Y. 1951). The bill of lading provided that, "for the purpose of avoiding uncertainties and difficulties in fixing value," shipments worth less than $500.00 per package were to be valued at "invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less." Invoice value was substantially less than the sound market value at destination, and, after interlocutory decree for libelant (95 F. Supp. 312; affd. 187 F. 2d 310), the case was referred to a commissioner to determine the amount of damages legally recoverable. The Commissioner's report, confirmed by the District Court, held the clause invalid and awarded libelant the amount of damage actually sustained, based upon market value. The opinion cited sections 4(5) and 3(8) of the Act, quoted above, and concluded that:

> "the effect of the language of the two sections construed together is to establish the liability of a carrier for the actual damages (within the stated limits) suffered by the shipper and to invalidate the stipulation of the bills of lading if in fact its application results in a loss as it does under the facts of this case." (1952 A.M.C. 1175).

Three years after the *Harry Culbreath* decision, the same rule was announced by the Exchequer Court of Canada in a case arising under the English Carriage of Goods by Sea Act 1924. *(Nabob Foods Ltd. v. "Cape Corso" (owners),* 1954 Lloyd's Law List Reports, Vol. II, p. 40). The case is persuasive authority since the pertinent parts of the English and American statutes are identical, both having been derived from the Brussels Convention of 1924. (See the discussion of the movement for international uniformity in this field in *Knauth: The American Law of Ocean Bills of Lading,* 4th ed. 1953, pp. 118-131). In addition, the Canadian Court reached its decision largely on the basis of American cases construing Cogsa, there being no English or Canadian cases in point.

The valuation clause under discussion provided, like appellee's clause herein, that the value of cargo

> "shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less. . . ."

In issue was the validity of the foregoing clause under the English Act which provides, like our own, that

"8. Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules shall be null and void and of no effect." (1954 Lloyd's Law List Reports, Vol. II, p. 41).

After quoting from the Harter Act the Court distinguished the cases decided thereunder in the following logical discussion (pp. 42-43):

"The Harter Act, it may be noted, did forbid the 'lessening' of the carrier's 'obligations', but these obligations were confined to obligations to carefully handle and stow cargo, and did not extend to the general obligation to pay for damage to cargo. . . ."

"The Statute of 1924 goes considerably further than the Harter Act. Unlike the Harter Act, it not only nullifies any clause that 'relieves' the carrier 'from liability', but also any clause 'lessening such liability.' This covers liability to pay, as well as obligations to handle goods properly. . . . That is, a clause such as we have in Clause 9 is void whenever it would operate to lessen what would otherwise be the carrier's liability, regardless of the fact that under other circumstances the effect would be to increase the liability. That, I think, is the effect of the American decisions on the new Act, which is essentially the same as the English Act. . . . Even *Smith v. The Ferncliff,* supra, which is the most favorable case to the defendant, is small comfort, because the Supreme Court indicated quite plainly that the clause upheld under the Harter Act would have been bad under the new Act.

"The defendant argued that it would be unreasonable to prevent a pre-estimate of damage when the parties (say, two minutes after a claim for damages had arisen) had it in their power to make an agreement as to the valuation, which should form the basis of an adjustment of the loss.

"But the McCaull-Dinsmore case shows that the mere reasonableness of a clause is not enough to support it if it goes against the language of the statute. Furthermore, after a loss the parties are on a parity; but at the time of shipment the carrier is often in a position to dictate to the shipper what terms the Bill of Lading shall contain. The Act presumably strikes at such potential dictation.

"But all that aside and apart from authority, looking at Clause 9 of our Bill of Lading, I find it impossible to say that this clause is not directed to liability; and, moreover, is not a clause that in this particular case lessens liability. As I have pointed out, except under special agreement, liability is for the arrived sound market value. It may be, though I need not decide the point, that if this Bill of Lading declared that the arrived sound market value was to be taken at £900, that would govern, even though I might conclude that the real market value was £1000. However, this Clause 9 does not say anything like that. It purports to substitute for the arrived market value something entirely different; in other words, an entirely new measure of damages for the common law measure. In this case that measure lessens the carrier's liability, and so in my view the clause cannot be given effect to."

The Harry Culbreath and *The Cape Corso* are the only two cases containing any substantial discussion of the

post-Harter Act validity of invoice value clauses. Both condemn such clauses under identical provisions found in the later American and English statutes. Those statutes, both having their source in the Brussels Convention, are part of the move for international uniformity in bill of lading legislation. Uniformity of decision, therefore, is not only desirable; it is imperative, if the uniform legislation is to achieve its intended result. No reported decision of any Court has upheld an invoice value clause since the Harter Act was superseded. It is therefore difficult to understand the District Court's Order for Decree below which, *without citing a single case on the point,* concludes that "better authority" supports the validity of appellee's clause (Tr. 40). Appellant submits that not only the better authority but *all* judicial authority since the Act was passed, and simple logic apart from the cases, compel the conclusion that appellee's clause is void.

IV.

NEITHER THE "REASONABLENESS" OF A CLAUSE NOR ITS LONG-CONTINUED USE CAN SUSTAIN IT AGAINST THE PLAIN LANGUAGE OF THE STATUTE.

We expect appellee to argue here, as in the Court below, that its clause should be upheld because it is "reasonable" and because it has been in use for a long time. These arguments might have been appropriate in the Congressional hearings, but they have no place in construing the statute as written. Section 3(8) sets up one test—the *effect* of a clause. If it operates to lessen liability it is void. The statute does not say "any clause

except a reasonable clause,'' or ''any clause except one which has been in use for a long time,'' or ''any clause except one which was valid under the Harter Act.'' What it does say is that ''*any* clause, covenant, or agreement'' lessening the carrier's liability shall be null and void.

If the effect of a clause in a particular case is to reduce the carrier's liability (as it is herein), it makes no difference to the importer whether that clause is drawn in terms of a formula or an amount, or whether it is expressed as a ''true valuation clause'' as contrasted with a ''limitation clause.'' Assume, for example, that four shipments of coffee, each invoiced at $80 a bag, including freight and insurance, but worth $100 a bag in San Francisco, arrive in a valueless condition due to carrier negligence. Assume further that each shipment is subject to a different bill of lading clause on damages, as follows:

1. ''The agreed value of the goods per package shall be the invoice value.''
2. ''The agreed value of the goods per package shall be $80.''
3. ''The carrier shall not be liable for more than the invoice value of the goods per package.''
4. ''The carrier shall not be liable for more than $80 per package.''

The first two clauses are valuation clauses, while the last two are limitation agreements. Presumably the valuation clauses would have been upheld under the Harter Act, while the limitation clauses would not. Yet the effect on the importer is exactly the same in each case: to lessen the carrier's liability by twenty percent. That effect runs

counter to Cogsa 3(8) and renders all four of the examples void.

The long-continued use of invoice value clauses proves nothing as to their legal validity. It merely emphasizes the fact that bill of lading forms are prepared by the carriers and do not represent negotiated contracts. In *United States v. Farr Sugar Corp.,* 191 F. 2d 370, affirmed 343 U.S. 236; 72 S. Ct. 666; 96 L. ed. 907, the Second Circuit, in holding invalid the widely used "both-to-blame" clause, remarked as follows, (191 F. 2d at p. 374):

> "One other fact requires special note. The shipowners stress the consensual nature of the clause, arguing that a bill of lading is but a contract. But that is so at most in name only; the clause, as we are told, is now in practically all bills of lading issued by steamship companies doing business to and from the United States. Obviously the individual shipper has no opportunity to repudiate the document agreed upon by the trade, even if he has actually examined it and all of its twenty-eight lengthy paragraphs, of which this clause is No. 9. This lack of equality of bargaining power has long been recognized in our law; . . ."

To the same general effect is language appearing in the District Court's opinion in *Pan-Am Trade & Credit Corporation v. The Campfire,* 64 F. Supp. 179 at p. 183:

> "It is urged by the respondents that a prorating clause in a bill of lading has been used by American carriers since September 1, 1937; that during the Second World War, recently concluded, the United States War Shipping Administration approved and used a uniform bill of lading which contained a prorating clause; that this would indicate a practical construc-

tion of the Act which this Court should follow. Although a prorating clause was incorporated in a uniform bill of lading in 1937 after the passage of the Act, the clause was not inserted at the request of the shippers. It was inserted by the carriers who prepared the bill of lading and it was in their interest to use it. The War Shipping Commission was a carrier, almost the sole American carrier during the war, and it too acted in its own interest in adopting the prorating principle in the event of a partial loss.''

Both the ''pro rata'' and the ''both-to-blame'' clauses were in almost universal use for many years before they were first tested in the courts and found invalid. Both clauses appear in appellee's bill of lading, which is the subject of this appeal (see Tr. 36, clauses 17 and 9). The only permissible inference from the long and wide use of such invalid clauses, including the invoice value clause, is that the carriers who drafted them for their own advantage intend to continue to use them as long as they can get away with it. It was that type of attitude and practice on the part of ocean carriers which made section 3(8) necessary.

The most recent American admiralty treatise, *Gilmore and Black: The Law of Admiralty* (1957) points up the philosophy of section 3(8) in discussing the very issue involved in this case (p. 167):

''The basis for fixing damages for loss of cargo under the general law is the market price at the port of destination on the day of arrival or when the vessel should have arrived. Before Cogsa was enacted, it seems to have been a common practice for the bill of lading to stipulate for 'invoice plus disbursements (freight and insurance)' as the measure of loss, and

> these stipulations were upheld. Under Cogsa, it has been held that such a clause, when it 'lessens' the carrier's liability, offends Section 3(8)."

The editors' comment is found in footnote 156:

> "These decisions seem clearly correct; Sec. 3(8) is in a sense the key to the Act, for it assures that the cargo interest will receive the broad benefits granted to it without gradual erosion by carefully contrived clauses in the bills of lading drawn up by carriers in concert. The only way it can fulfill this function is by being construed to mean what it says, without too great attention to arguments based on a 'convenience' which usually turns out to be carrier's convenience."

V.

THIS COURT SHOULD ORDER A DECREE BASED UPON MARKET VALUE.

This is not a case which, upon a reversal, must be sent back to the trial Court for retrial or for computation of damages. All of the factors required to compute damages in accordance with the proper rule appear in the agreed statement and the findings. They establish a liability on the part of appellee of $8,663.49 plus interest and costs. Once the invoice value clause is declared void nothing remains to be done except the entry of a decree in the proper amount.

The foregoing is true in spite of the continued presence in the case of the custom defense, and the trial Court's omission to make any findings or conclusions thereon. The alleged custom would substitute an invoice value formula

for the market value measure of damages, and would thus lessen appellee's liability in the same manner as the bill of lading clause. If the clause is one which may not validly be inserted in an express contract between the parties, it is elementary law that an equivalent custom or usage cannot be given effect.

Barnard v. Kellogg, 10 Wall. (U.S.) 383; 19 L. ed. 987;

Thompson v. Riggs, 5 Wall. (U.S.) 663; 18 L. ed. 704;

Ullrich v. State, 186 Md. 353; 46 Atl. 2d 637;

Interstate Trust Co. v. United States Nat. Bank, 67 Colo. 6; 185 Pac. 260;

3 *Williston on Contracts,* Revised Edition, 1936, p. 1890.

The Carriage of Goods by Sea Act was a compromise designed to balance the conflicting interests of carrier and shipper. The carriers received an automatic limitation of $500 per package, under section 4(5), without the necessity of a choice of rates which had been required under the Harter Act. Having granted that benefit to the carriers, Congress made it plain that no other restriction on the amount of cargo recoveries would be permitted. Section 4(5) says in so many words that a higher, but not a lower, maximum may be fixed, and section 3(8) invalidates clauses otherwise lessening the carrier's liability.

The effect of appellee's clause is to avoid the substance and intent of the Act. Thus, it proposes to pay invoice value *if less* than $500 per package, rather than market value, the legal measure of liability; but to pay only $500 per package if the invoice value is greater. The intent of

the clause, therefore, is to lower the maximum liability fixed by section 4(5), contrary to its express terms, and contrary to the terms of section 3(8).

We have learned from experience that a common carrier, having the power to dictate contractual terms, will use that power to its own selfish advantage unless restrained by the legislatures and the courts. Appellee's carefully contrived invoice value clause would, if allowed to stand, be a step in the gradual erosion of the benefits granted to cargo interests by the Carriage of Goods by Sea Act. To allow it to stand would be to ignore the plain language of the Act.

That the decree should be increased to the amount of $8,663.49, plus interest and costs, is

Respectfully submitted,

Lloyd M. Tweedt,

Carter Quinby,

Derby, Cook, Quinby & Tweedt,

Proctors for Appellant.

Dated, San Francisco, California,
May 19, 1958.

No. 15,940

United States Court of Appeals
For the Ninth Circuit

Otis, McAllister & Co., a corporation,
Appellant,
vs.
Skibs, A/S Marie Bakke,
Appellee.

APPELLEE'S BRIEF.

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No. 15,940

United States Court of Appeals

For the Ninth Circuit

Otis, McAllister & Co., a corporation,
Appellant,

vs.

Skibs, A/S Marie Bakke,
Appellee.

APPELLEE'S BRIEF.

JURISDICTION.

Appellee does not controvert the statement of jurisdiction presented by the appellant.

STATEMENT OF THE CASE.

Appellee does not controvert that portion of appellant's Statement of the Case presented on page 2. On page 3 certain of appellant's statements should be modified to state the case correctly. In the court below, appellee claimed that the recoverable damages should be measured (not that "liability should be limited", as stated by appellant) by Clause 18 of its bill of lading.[1] Appellee contended

---

[1] The District Court concluded that "Libelant's damages are to be measured" by Clause 18 (Conclusion of Law IV, Tr. 45.)

that Clause 18 was an agreed valuation clause[2] and was valid and binding on the parties. Appellant contended that Clause 18 was invalid by reason of Section 3(8) of the Carriage of Goods by Sea Act (COGSA), (46 U.S. Code Sec. 1303(8)) which voids clauses which relieve a carrier from liability arising from negligence in the duties or obligations imposed by Section 3 or lessen such liability. Both Judge Hamlin, in the Order overruling appellant's exception to the Answer (Tr. 30), and Judge Goodman, in the Order for Decree (Tr. 39-40), concluded that Clause 18 is "a valid 'true valuation clause'." An agreed valuation clause does not relieve a carrier from liability or lessen such liability and is not invalidated by COGSA. A Final Decree (Tr. 46) was entered awarding appellant damages measured by the agreed valuation clause. Clause 18 provided in its relevant parts that:

> "it is agreed that in view of the difficulty of determining in advance what the market value of the goods will be upon arrival at destination, the 'agreed value' thereof . . . shall be an amount equal to the shipper's invoice value, if any, . . . plus . . . freight, insurance and duties, . . . irrespective of whether any other value is greater or less, and in case of loss of, or damage to, or in connection with such goods, the Carrier's liability, if any, shall be determined on the basis of such 'agreed value', . . ."
>
> (Finding of Fact VII, Tr. 43)

---

[2]It is inaccurate to refer to an agreed valuation clause, as appellant does in the statement and throughout the brief, as an "invoice value clause". The clause fixes a value which includes not only "invoice value" but also "freight, insurance and duties", thus assuring the cargo owner of full recovery of the actual landed cost of the goods at destination, i.e., his entire investment in purchasing, transporting, insuring and entering the goods through Customs. The cargo owner is thus "insured" against any out-of-pocket loss even if the market price should decline.

Appellant states the issue of this appeal (Br. 4) as: "whether a common carrier subject to the Carriage of Goods by Sea Act may utilize an invoice clause to reduce its liability to an amount less than the actual damages suffered . . ." The issue correctly stated is: Does the Carriage of Goods by Sea Act prevent the parties to an ocean bill of lading from agreeing to a formula to determine the value of goods in calculating any damages for which the carrier may become liable?

ARGUMENT.

Appellee's argument is summarized as follows:

Clause 18 of the bill of lading governing the shipment is an agreed valuation clause. Such a clause was valid in bills of lading under the general rules of maritime law and under the Harter Act, 46 U.S. Code, Secs. 190, et seq. Nothing in COGSA effects a change in the law by which the freedom of the parties to provide for an agreed value to be used in determining damages is abridged. The meaning of the words of COGSA as interpreted by the Supreme Court does not invalidate agreed valuation clauses. Neither the history of COGSA nor the record of its passage by Congress in 1936 shows any intention to change the prior law with respect to agreed valuation clauses.

The issue before this Court is clouded unless the distinction between "agreed valuation clauses" and "clauses of limitation" as defined by the United States Supreme Court is understood. Appellant admits there is a distinction (Br. 11) but dismisses the distinction as insignificant. In fact, the distinction is critical to the issues before this

Court and must be fully understood before the application of COGSA to agreed valuation clauses can be determined. Hereafter we shall first consider what agreed valuation clauses are, the rules concerning them before COGSA, and finally the proper effect of COGSA on those rules.

I.

THE DISTINCTION BETWEEN "AGREED VALUATION CLAUSES" AND CLAUSES AFFECTING OR LIMITING LIABILITY.

Fundamental to resolution of the issue before the Court is the distinction between agreed *valuation* clauses and other clauses such as those which *affect* liability or *limit* the amount of recoverable damages. For clarity and convenience in considering these matters, three different clauses should be defined and distinguished:

(a) "Negligence" or "liability" clauses, which we shall call *liability clauses,* relieve a carrier from legal responsibility for negligence in performing its obligations or duties, as the obligation to load, stow and carry the goods. Under the Harter Act certain exemptions from liability were granted by Section 3 and all others which would have the effect of relieving the carrier from liability or lessening, weakening or avoiding the carrier's obligations to the cargo were prohibited by Sections 1 and 2. Similar statutory exemptions are granted by Section 4(2) of COGSA (46 U.S. Code Sec. 1304(2)) and similar prohibitions against other contractual exemptions are provided in Section 3(8) of COGSA. Liability clauses are not in issue in this case.

(b) By agreed or "true valuation" clauses, which we shall call *agreed valuation clauses,* the parties agree in advance that the goods shall have a certain value, or agree upon a formula for determining that value, which is to be used in calculating the amount of damages, *after* legal responsibility has been determined to exist. The amount of damages so determined may be greater or less than, or the same as, the amount would be in the absence of such agreement. Depending upon the facts of each case, the clause may therefore benefit either party to the agreement. Neither the Harter Act nor COGSA specifically treats such clauses. The Supreme Court held them valid under the Harter Act[3]. Whether this rule has been changed by COGSA is the issue in this case.

(c) "Limitation" or "limitation of liability" clauses, which we shall call *limitation clauses,* fix an arbitrary maximum amount which the carrier shall pay, after legal responsibility has been determined, irrespective of the actual damages. The limitation clause, usually providing that the carrier shall not be liable "in an amount exceeding" a specified amount of money per package, unrelated by formula or otherwise to actual value, can only operate *against* the cargo owner, never *for* him. The Harter Act left such clauses to contract between the parties. Now the limitation is expressed both in Section 4(5) of COGSA (46 U.S. Code, Sec. 1304(5)) and in contractual provisions which repeat the same monetary limit set by the statute. Limitation clauses are not in issue in this case.

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[3]Appellant admits this rule, so extended citation of authority is unnecessary. The leading case is *Smith v. The FERNCLIFF,* 306 U.S. 444, 59 S. Ct. 615, 83 L. Ed. 862, 1939 AMC 403 (1938).

Each of the clauses will apply in a given case as illustrated in the following example: Silk, in boxes, is totally damaged during ocean carriage. Assume the CIF value is $490 per box and the market value at destination is either (a) $450 or (b) $530. If the carrier is not excused by a *liability clause* relieving it of legal responsibility for the damage, liability is determined. After liability has been determined, the *agreed valuation clause* is applied to fix a value on the goods for the purpose of calculating damages, which under Clause 18 would be $490 (assuming no Customs duties applied). If the contract contained no agreed valuation clause and if damages were calculated by reference to market value[4], the value of the goods would be (a) $450 or (b) $530. Then the statutory limit of $500 per package, and the contractual *limitation clause* expressing the statutory limit are applied to fix the amount which the carrier must actually pay. If the contract contained an agreed valuation clause, cargo would recover $490. If there were no agreed valuation clause, cargo would recover either (a) $450 or (b) $500.

---

[4]While we concede that the usual legal measure of damages, in the absence of a contractual provision otherwise, refers to market value at destination, the law is flexible in applying other measurement factors where reason and convenience so indicate. For example, in *Instituto Cubano de Establizacion del Azucar v. Star Line*, 1958 AMC 166 (Arb.), damages were measured by reference to purchase price of the goods at port of embarkation to fix value, plus freight and customs duties.

> "The Courts, indeed, have frequently held that damages are not necessarily based on market prices, and, as a matter of practice, settlements are usually based on the invoice." *Poor on Charter Parties and Ocean Bills of Lading*, 4th Edition (1954), page 184.

The foregoing example illustrates these points:

(1) A liability clause operates to determine whether there is any legal responsibility of the carrier at all. It does not fix or affect the damages recoverable if the carrier is held liable.

(2) An agreed valuation clause merely furnishes a means of determining the value of the goods in calculating damages. It does not determine liability. It can, as compared with market value or any other standard of value, *either increase or decrease* the value of the goods used in calculating the damages recoverable by the cargo owner.

(3) A limitation clause *may decrease* the damages otherwise recoverable, but it *never increases* them.

II.

THE SUPREME COURT APPROACH TO RESOLVING THE ISSUE OF THIS CASE.

The correct approach for resolving the issue of this case is established by the Supreme Court in *U.S. v. Atlantic Mutual Insurance Co.,* 343 U.S. 236, 72 S. Ct. 666, 96 L. Ed. 907 (1951) (*ESSO BELGIUM-NATHANIEL BACON*). While the *ESSO BELGIUM* is concerned with a "Both-to-Blame" clause and with different sections of the Harter Act and COGSA,[5] the approach of the Court

---

[5] A "Both-to-Blame" clause in a carrier's bill of lading would be classified as a liability clause, as hereinabove defined, and was found invalid as a stipulation against a carrier's liability for negligence. The result of the case does not affect other bill of lading clauses, such as agreed valuation clauses. The phrasing and application of the Both-to-Blame clause itself have no particular relevance to the present proceedings.

to the question of validity of a particular clause under COGSA is important and controlling here. The Court stated, 343 U.S. at page 240:

> "Our question . . . is whether the langauge of the Harter Act, substantially reenacted in the Carriage of Goods by Sea Act, has carved out a special statutory exception to the general rule . . ."
>
> (Page 241) "When Congress passed the Carriage of Goods by Sea Act in 1936, it indicated no purpose to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity of the 'Both-to-Blame' clause. At that time all interested groups such as cargo owners, shipowners, and the representatives of interested insurance companies were before the congressional committees. Although petitioner and respondents both appear to find comfort in the language and the hearings of the 1936 Act, nothing in either persuades us that Congress intended to alter the Harter Act in any respect material to this controversy."

In the *ESSO BELGIUM,* the Court found that a Both-to-Blame clause would be invalid under the general rules of maritime law and under the Harter Act. It concluded that nothing in the language or Congressional hearings of COGSA indicated that COGSA altered those general rules or the rule under "the Harter Act in any respect material" to that clause.

Applying the criteria of the Supreme Court to the present case we must determine: (1) What were the general rules and the rule under the Harter Act with respect to agreed valuation clauses? (2) Did Congress, in enacting COGSA carve "out a special statutory excep-

tion to the general rule'' or ''alter the Harter Act in any respect material to'' agreed valuation clauses? (3) When Congress passed COGSA in 1936 did it indicate any ''purpose to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity of'' an agreed valuation clause?

A.

The General Rule, Before COGSA, Declared Agreed Valuation Clauses Valid.

Agreed valuation clauses were valid under the general rules and under the Harter Act.[6] Appellant admits this to be the case. In this respect this case is just the reverse of the *ESSO BELGIUM* in which the clause there under consideration was invalid under the general rules and under the Harter Act.

B.

The Language of COGSA Indicates no Change in the General Rule Prior to COGSA.

Did Congress by enacting COGSA carve ''out a special statutory exception to the general rule'' or ''alter the Harter Act in any respect material to'' agreed valuation clauses? Appellant argues that the language of Section 3(8) of COGSA materially differs from Sections 1 and 2 of the Harter Act. Let us first examine the language of the sections.

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[6]*Smith v. The FERNCLIFF,* supra, 306 U.S. at 448:
"For a long time, in the absence of a controlling statute, fraud or imposition, such provisions in bills of lading have been recognized as valid by this and other Federal Courts."

The Harter Act, Sections 1 and 2 (46 U.S. Code, Secs. 190 and 191) provide it shall not be lawful for the manager, agent, master or owner of any vessel:

> "(Sec. 190) to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge . . . [or] (Sec. 191) whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided."[7]

Any and all words or clauses of such import inserted in bills of lading or shipping receipts were declared by Section 190 to be null and void and of no effect.

Section 3(8) of COGSA, read with the balance of Section 3, merely restates Sections 1 and 2 of the Harter Act in one paragraph instead of two.

Does Section 3(8) of COGSA contain language materially different from Sections 1 and 2 of the Harter Act? The same duties are imposed elsewhere in Section 3. Section 3(8) then provides:

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[7]"These two sections, in their general purport, so far as respects the care and delivery of cargo, are not substantially different . . ." *Calderon v. Atlas Steamship Co.* (1897) 170 U.S. 272, 277, 18 S. Ct. 588, 42 L. Ed. 1033, 1035.

> "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect."

Section 3(8) is substantially identical in content to Sections 1 and 2 of the Harter Act. Certainly no express reference is made to agreed valuation clauses nor is any change explicit with regard to such clauses.[8] Nor is it surprising to find the same words and the same concepts of the Harter Act rephrased in COGSA when it is acknowledged that COGSA was intended "to carry over into the international sphere the uniformity achieved for American voyages in the Harter Act.", and embodies "substantially the provisions of the earlier Harter Act of 1893" (*Scarburgh v. Compania Sud-Americana de Vapores,* (CA NY 1949) 174 F. 2d 423.) It seems quite obvious that the words themselves of Section 3(8) do not reveal any "special statutory exception to the general rule" nor "alter the Harter Act in any respect material to" agreed valuation clauses.

The decisions under the Harter Act have given meaning to the words reenacted in Section 3(8) of COGSA and are applicable to the same words of COGSA. *The BILL* (DC Md. 1942) 47 F. Supp. 969, affirmed 145 F.

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[8]Contrast the concluding words of COGSA Section 3(8) "A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability", an express reference which is not contained in the Harter Act.

2d 470. *Spencer Kellogg & Sons v. Great Lakes Transit Corp.* (ED Mich. 1940) 32 F. Supp. 520, 530.

> "In view of the well-settled nature of the general rule at the time the statute was adopted, it must result that legislative approval was by clear implication given to the general rule as then existing in all cases where it was not changed."
>
> *The KENSINGTON,* 183 U.S. 263, 268-269, 22 S. Ct. 102, 46 L. Ed. 190, 193, as quoted with favor in the *ESSO BELGIUM,* 343 U.S. at pages 239-240.

Under the Harter Act an agreed valuation clause was valid. Such a clause "*prescribes a measure of recovery* rather than limits the amount which may be recovered when loss or damage occurs." (Emphasis added.) *Smith v. The FERNCLIFF,* supra.

It is useless to cull refinements of meaning from a fussy examination of the words "obligation" and "liability". These are not words of art. Section 3 of COGSA sets forth a carrier's obligations to exercise due diligence, to load, stow, carry, care for and discharge the goods carried. Patently a breach of these obligations creates liability. When COGSA seeks to prevent these obligations from being in any way reduced or avoided, it provides in Section 3(8) that liability for breach of an obligation may not be lessened. Substantially the same obligations in Section 3 of COGSA are set forth in Sections 1 and 2 of the Harter Act. These sections address themselves to the same fundamental matter of a carrier's liability for its obligations. An "obligation" includes liability to respond for breach. Lessening the liability for breach lessens the obligation, a result prohibited

by the Harter Act. Similarly when recovery is reduced from, say, $100 to $80, can it only be said that liability, or the obligation, was "relieved" by $20 but was not "lessened" by the same amount? Such words were not given narrow technical meanings. If, for example, "liability" were used in the Act as a word of art, then it should certainly be distinguished from the "measure of liability" or the amount which is recovered after "liability" is established. In fact, Section 4(5) of the Act does refer specifically to "the amount of damage", "the maximum amount" and words of like purport when referring to monetary recovery for liability. We are certain that appellant, even for consistency's sake, is unwilling to limit the word "liability", as used in Section 3(8) of COGSA, to this narrow meaning[9]. To do so would end this case summarily. In any event, perhaps the foregoing will illustrate that this kind of approach to the problem merely turns an important inquiry into a legalistic game of "Scrabble". It is historically clear that the drafters of COGSA and Congress were not concerned with such shades of meaning. Any inquiry, to be profitable, must avoid word haggling and go into the history of COGSA to ascertain how the Act came before Congress and how Congress intended it should apply.

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[9]Appellant seems to have had some concern about this possibility, for it makes an effort to show that "lessening of liability prohibited by Section 3(8) also refers to the measure of damages" (Br. 14). In other words, appellant says "liability" in Section 3(8) should not be given a narrow meaning but should be given a broader meaning to include "measure of damages." But, in trying to show a difference between the Harter Act and COGSA, appellant would give narrow meanings to the same words in the Harter Act.

C.

The History of COGSA Indicates no Intention to Change the Relationships Between Carriers and Shippers in Any Way Relevant to the Validity of Agreed Valuation Clauses.

The *ESSO BELGIUM* requires an answer to this question: Was there "a purpose to bring about a change in the long existing relationships and obligations between carriers and shippers"? Appellant turns to this inquiry only briefly when it notes that the Supreme Court in the *ANSALDO SAN GIORGIO*[10] used the words "may lessen the carrier's normal liability" (when discussing the effect of a true valuation clause on a rising market) and assumes that Congress enacted this meaning into COGSA (Br. 12). Otherwise appellant dismisses the whole inquiry as "of only historical interest." Unfortunately any approach that italicizes six words in a Supreme Court decision and concludes that Congress relied upon these and the possibility of future litigation to make explicit a basic change in the law does not get us far in our inquiry. In this instance appellant's conclusion that Congress was "using those words [of the Supreme Court in 1935] in the same sense" in COGSA becomes meaningless when it is recalled that the words in Section 3(8) were written in 1922 and formalized in an international Convention in 1924, commonly referred to as the Hague Rules. This section of the Hague Rules was enacted verbatim by Congress in 1936. Except for this single, and patently erroneous, reference to the question of congressional intent, appellant ignores the whole inquiry. What does careful inquiry into the development of the Hague

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[10]*Ansaldo San Giorgio I v. Rheinstrom Bros. Co.,* 294 U.S. 494, 55 S. Ct. 483, 79 L. ed. 1016 (1935).

Rules and the record of their enactment into law by Congress in 1936 show?

The history of the Hague Rules up to their enactment by Congress in 1936 is set forth in the hearings before the Senate and House. *Hearing before the Senate Committee on Commerce on S 1152,* 74th Congress, 1st Session, pages 17 et seq., 29 et seq., 45 et seq., 77 et seq. Briefly, the Harter Act, passed by Congress in 1893, represented a highly successful compromise in the United States of conflicting carrier and shipper aims. Pressure thereafter developed among the leading commercial nations to achieve in the international sphere of trade the uniformity of American voyages under the Harter Act. *Scarburgh v. Compania Sud-Americana de Vapores,* supra.

> "Starting with American law as a basis, as regulated by the Harter Act, . . . a code was drafted under the auspices of the International Law Association, and a conference was then called at The Hague, at which shippers, bankers, cargo underwriters, and steamship owners were fully represented. At that Conference . . . this draft code was debated, section by section, and an agreement was arrived at for a fair division of the risks of transportation between the cargo interest on the one hand, and the carriers, on the other." (Report of the Senate Committee on Foreign Relations, printed in the *Senate Hearing,* supra, page 17 et seq.)

A Diplomatic Conference at Brussels in 1924 resulted in adoption of the code as a Convention which was then signed by all twenty-four nations present, including the United States, Great Britain and the other great mari-

time powers. The succeeding years witnessed study, debate and gradual acceptance of the Hague Rules by all interested commercial groups on the American scene. In 1930, a general conference called by the United States Chamber of Commerce was attended by an impressive group of shippers, underwriters, bankers, merchants and other cargo interests resulting in agreement to recommend approval of the Hague Rules to Congress. This conference was important because of the broad scope of cargo interests represented and the careful consideration reportedly given to the Convention and all suggestions submitted relevant to it.

The Convention was approved by the Senate for ratification on April 1, 1935. Enactment of the Convention into statutory form was the subject of hearings before committees of both houses of Congress. Support of the Convention before the Committees was unanimous.[11]

Reports and recommendations from the Departments of State and Commerce and the Attorney General were received. An underlying inquiry throughout the hearings was "how, if at all, does COGSA change existing American law under the Harter Act?" Time and time again witnesses and reports addressed themselves to this question and enumerated the changes COGSA would bring about. All agreed that the principal changes were:

1. COGSA raises the per package limitation of liability to which the carrier is entitled to $500. The carrier is prohibited from limiting its liability, as

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[11]"At that time all interested groups, such as cargo owners, shipowners and the representatives of interested insurance companies were before the Congressional Committee." *ESSO BELGIUM,* 343 U.S. at page 241.

it previously could, to some lower figure. *COGSA Section 4(5).*

2. The time for commencing suit against a carrier for damage to goods is fixed at one year. *COGSA Section 3(6).* Previously, shorter time limits had been permitted.

3. Unless the cause of damage to cargo falls within one of the specific exemptions enumerated in COGSA Section 4(2) (a) through (p), the burden of proof is placed upon the carrier to prove that he was not negligent if goods received sound are delivered damaged. Previously, the burden of proof of negligence was usually on the cargo owner.

4. The harsh results of the Supreme Court's decision in *The ISIS,* 290 U.S. 333, were alleviated in connection with the carrier's burden of showing due diligence for seaworthiness even if not causally related to the cargo damage.

Some witnesses and reports before the Committees were more detailed. For example, the Department of Commerce Memorandum of S-1152 discusses the Act section by section with respect to any changes made in existing law. With respect to Sections 3(7) and (8), it stated:

> "No change of existing law except that by the latter 'benefit of insurance' provisions in bills of lading are nullified. Such provisions now are valid but in practice are made negatory . . . For practical purposes, this change in the law is unimportant—it merely accomplishes by law what in practice heretofore has been done by contract." *Hearings before the Committee on Merchant Marine and Fisheries,*

House of Representatives, 74th Congress, Second Session, page 11.

A lengthy statement presented by the American Bankers Association to both House and Senate Committees (House, page 42, Senate, page 45) analyzes the bill carefully, comparing it to the Harter Act, and noting changes to be brought about. No change is noted with respect to Section 3(8) or as to agreed valuation clauses. A memorandum submitted by the American Steamship Owners Association spells out ten advantages to be gained by shippers from the bill. (House, page 59.) In this analysis the only reference to change under Section 3(8) is to invalidation of benefit of insurance clauses.

Throughout the hearings before the Senate and House no suggestion is made that Section 3(8) makes any change in existing law in any respect material to agreed valuation clauses.

At no time in the hearings is an agreed valuation clause mentioned, examined or explained.[12]

At no time did any shipper interest or report express concern with such clauses or condemn them as objectionable, although many clauses were debated, including the

[12]In several instances in the hearings and reports, when referring to Section 4(5) and the $500 per package limitation, statements appear, as "restrict recovery to an agreed valuation as low as $100 per package" (Campbell—House p. 60) and "The Harter Act makes no direct reference to valuation clauses . . . [COGSA] imposes a liability of $500 per package" (Barber—Senate p. 32). In each instance it is clear from the context that "valuation" is in no sense given a meaning of art. The reference is always in connection with limitation of liability clauses and with section 4(5) of the Act and not concerned with agreed valuation clauses as we have used that term and as it is used by the Supreme Court in *The FERNCLIFF* and in *ANSALDO SAN GIORGIO*.

"Both-to-Blame" clause and the prorating clause later condemned in *The CAMPFIRE,* infra.

There are definite references in the hearings to specific bill of lading clauses wherever any relevant change in existing law will be brought about. For example, the benefit of insurance clause mentioned in Section 3(8), is discussed because the law would be changed, even though the practical effect of the change was of no significance. In the case of "Both-to-Blame" clauses, which were only then coming into use, discussion for a time got quite lively when cargo interests sought to have COGSA amended to remove any uncertainty in the Act as to the validity of such clauses. As the Court states in the *ESSO BELGIUM,* 343 U.S. p. 241, both parties to the controversy over "Both-to-Blame" clauses found comfort in the hearings of the Act. There were also references in the hearings to recent Supreme Court cases, particularly *The ISIS,* supra, in any instance where the Act would effect a change in the existing law as interpreted by the Supreme Court. Nowhere, however, is reference made to the *ANSALDO SAN GIORGIO,* supra, or to the six words of that decision which appellant assumes were used by Congress "in the same sense in" COGSA.

Congress was not ignorant on the subject of agreed valuation clauses. Nor were shippers and carriers by rail and water and their underwriters unaware of them. They had long used such clauses and involved them in various court tests culminating with the *ANSALDO SAN GIORGIO* in 1935 and *The FERNCLIFF* which involved a pre-COGSA shipment of goods. In 1915 Congress had enacted the Cummins Amendment (49 U.S.

Code, Sec. 20(11)) to the Interstate Commerce Act specifically prohibiting rail carriers from including in rail bills of lading "any limitation of liability or limitation of the amount of recovery or representation or *agreement as to value* . . ."[13] (Emphasis added). Congress therefore had precise statutory language at hand which it had previously used and could have used in COGSA if it intended to change the rule under the Harter Act. Why did Congress not use explicit language, as it had before, if the change in the law appellant asserts was intended? In other connections, Congress changed words, phrases and added provisos to make "explicit a right which otherwise might be regarded as merely implied in the language" of the Act. (Senate Report No. 742, 74th Congress, 1st Session, page 2.)

In conclusion, a thorough exploration into the legislative history of COGSA demonstrates no purpose on the part of Congress (in the words of the *ESSO BELGIUM*) "to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity" of agreed valuation clauses. In the absence of such Congressional purpose, we must conclude that COGSA, like the Harter Act before it, left the parties to bill of lading contracts free to agree on the value to be used in computing damages, and Con-

[13]This language was declared by Justice Holmes in 1920 to invalidate agreed valuation clauses in rail carriers' bills of lading. *Chicago RR Co. v. McCaull-Dinsmore Co.,* 253 U.S. 97, 40 S. Ct. 504, 64 L. Ed. 801 (1919), cited with approval by the Supreme Court in *The FERNCLIFF,* 306 U.S. p. 448. In holding the clause invalid, Justice Holmes recognized the convenience of such a stipulation in a bill of lading and the arguments in its favor. By its express terms, the Cummins Amendment left the rules applicable to water carriers unchanged.

gress neither found nor expressed any public policy against this long-existing practice.

III.

CERTAIN POINTS OF APPELLANT'S BRIEF REQUIRING CLARIFICATION.

Certain specific points raised in appellant's brief require clarification.

A

The Dictum of the District Judge in The FERNCLIFF.

Appellant quotes (Br. 15) a dictum from *The FERNCLIFF* decision of 1938 as follows: "The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act . . ." Actually the quoted words, like many in that opinion, are those of District Judge Chestnut and are a part of the lengthy portion of his opinion quoted by the high court. In certifying the questions to the Supreme Court, Judge Chestnut also stated:

> "Notwithstanding the passage of the Carriage of Goods by Sea Act of April 16, 1936 . . . the question as to the correct method of computing damages under a valuation clause is deemed an important one . . ."

Whatever Judge Chestnut may have meant by these two apparently conflicting dicta, it is clear that after fuller opportunity to consider the matter, he concluded that the difference between an agreed valuation clause and a limitation clause was important under COGSA. His analysis of the issues in *The STEEL INVENTOR,* 35 F. Supp. 986 (D. Md. 1940) and *The BILL,* 55 Supp. 780 (D. Md. 1944) is enlightening. In *The STEEL IN-*

VENTOR he had before him a clause which *limited* the amount of the carrier's liability to *invoice cost* and he stated (page 998):

> "It is said by a recent commentator that, despite the provisions of the recent United States Act, [COGSA] it is still permissible for the shipper and carrier to agree that loss claims shall be adjusted on the basis of the invoice value of the merchandise instead of on the market price at port of destination, that is, they may agree upon a true valuation clause as contrasted with a limited liability clause. Knauth on Ocean Bills of Lading, p. 161. But it is said by counsel that there is no judicial decision on this point. Assuming the correctness of the position as stated, I am still unable to reach the conclusion that the provision in the bill of lading relied on is controlling in this case. As I read and construe it, it constituted a 'limitation of liability clause' and is not a 'true valuation' clause. The distinction between, and the respective legal effects of, the two types of clauses are clearly explained in two recent Supreme Court cases."

Judge Chestnut held that the clause in question was a limitation clause invalid under Section 4(5) of the Act. This conclusion was obviously correct, since the clause was worded as a *limitation,* not as an agreement on value. In discussing COGSA, he observes that the effect of the Act

> "leaves the shipper free to recover his actual damages when less than the maximum stated in the Act . . . at least where the bill of lading does not contain a true valuation clause as distinct from a mere limitation of liability clause."

In *The BILL,* Judge Chestnut considered an agreed valuation clause in a bill of lading covering a shipment

of oil in bulk. The clause provided for damages to be measured on the basis of market price at the port of destination. The application of the clause would have resulted in damages of $546.70 per customary freight unit, "thus exceeding the limitation in the Act of $500 per 'customary freight unit'." The carrier is permitted by Section 4(5) of COGSA to agree to a *limitation* higher than $500 per package. Therefore, if the bill of lading clause were the kind of limitation provision expressly permitted by Section 4(5) of the Act, the court would have had to apply it. The court, however, held the bill of lading clause "is a valuation clause rather than a limitation clause, and does not override the requirements of the limitation clause in the Act." (55 F. Supp. at 783). The court concluded (page 784) that neither the particular wording nor the bill of lading clause "in the whole context, furnishes any reasonable basis for the view that it was intended to override the limitation clause *or to express 'another maximum amount'* than that contained in the limitation clause." (Our emphasis.)

B

The Case and Text Authorities.

Appellant cites the following cases and authorities to support its position:

The HARRY CULBREATH, 1952 A.M.C. 1170 (SD NY) (Br. 15 et seq.);

The CAPE CORSO, 1954 Lloyd's Law List Reports, Vol. II, page 40 (Br. 16 et seq.);

Gilmore and Black: *The Law of Admiralty* (1957) (Br. 22-23).

In the *HARRY CULBREATH* the carrier's liability for damage was determined in trial before the District

Court and the cause was then referred to a commissioner "to ascertain and report the amount due said libelant." The commissioner applied market value in ascertaining the amount due and rejected the valuation clause of the bill of lading. The district judge simply confirmed the commissioner's report. The case was not appealed. It does not appear whether or to what extent the issues were briefed or argued before the District Judge. The commissioner's report demonstrates a complete failure to appreciate the effect of agreed valuation clauses and relies upon cases dealing with limitation clauses. We submit that the commissioner's opinion was not well reasoned and is simply incorrect.

The *CAPE CORSO* is a decision of the Court of British Columbia Admiralty District, Exchequer Court, and the decision was not appealed. We submit that an appellate court will not be bound by a Canadian court's reading of American law, particularly when the Canadian judge, in reaching his conclusion, (a) relied upon the abovementioned dictum of the District Judge of *The FERNCLIFF,* apparently believing the Supreme Court had passed on the matter, and without, evidently, considering the later conclusions of the author of the dictum; (b) relied upon the *McCall-Dinsmore* case, supra, without fully appreciating the Supreme Court's ruling that the language of the Cummins Amendment was explicit on the question of valuation clauses in rail bills of lading and that, consequently, reasonableness of the clause could not override clear statutory language; (c) ascribed a reason for the Supreme Court's holding in *The FERNCLIFF* which was neither stated nor intimated by that high

court; and (d) reached his conclusion without reference to the process prescribed by the Supreme Court in the *ESSO BELGIUM*.

In any event, we submit that the conclusions of Judge Hamlin and Judge Goodman are entitled to greater weight than those of a commissioner in New York and a Canadian judge reading United States law.

With respect to text authorities, we refer the court, in contrast to the Gilmore and Black single volume on the entire law of admiralty, to the following:[14]

Knauth on Ocean Bills of Lading, 4th Ed. pp. 277-279[15];

Poor on Charter Parties and Ocean Bills of Lading, 4th Ed. pp. 183-184, 221-223;

A. J. Hodgson—The Carriage of Goods by Sea Act 1924 (1932) p. 34.

We do not feel that any useful purpose will be served by extended discussion of *The CAMPFIRE,* 156 F 2d

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[14]These authorities do not indulge in such questionable editorializing and black descriptions as "gradual erosion by carefully contrived clauses . . . drawn up by carriers in concert." We think the editors, Gilmore and Black, should have read the Supreme Court's decisions on the problem. The two decisions which to those editors "seem clearly correct" are actually not concerned with agreed valuation clauses at all, but only with limitation of liability clauses.

[15]The author, Arnold W. Knauth, then secretary of the Maritime Law Association and probably the leading authority on ocean bills of lading in the United States, appeared before both the Senate and House Committees in the hearings on the bill. He concluded, at page 278 of the cited edition, that "There seems to be nothing in the Carriage of Goods Act to prevent the continuance of this practice" of agreed valuation clauses, and at page 279, "The silence of Congress in the COGSA legislation of 1936 (into which several amendments were introduced, and to which several extra sections were annexed) would seem to imply refusal to condemn the clause in the COGSA trades."

603 (CA 2, 1946) or *The EXIRIA,* 1958 AMC 439 (SD NY 1958) both of which were concerned with the $500 per package limitation of Section 4(5) of COGSA. Each decision declares invalid a clause providing for a limitation of liability in a form otherwise than provided by Section 4(5). We do not disagree with the proposition that limitation clauses are invalid under Section 4(5) of COGSA if they violate the statutory requirement that "such maximum shall not be less than the figure above named." Such a proposition is not, however, material to the question of agreed valuation clauses.

There were also particular requirements for validity of limitation clauses under the Harter Act. They were invalid unless "tied to the rate"—i.e. unless the shipper was offered a choice of freight rates depending on what maximum limitation he was willing to accept. If the validity of an agreed valuation clause depended on meeting the requirements for validity of a limitation clause, then under the Harter Act an agreed valuation clause would have to be "tied to the rate" to be valid. This precise question was certified to the Supreme Court in *The FERNCLIFF*. The question was:

> "1. Is an invoice cost valuation clause, such as that here involved, inserted in a marine bill of lading without offering a choice of rates to a shipper, valid and binding on the parties?"

After pointing out the fundamental difference between and effect of an agreed valuation clause and a limitation clause, the high court answered:

> "To the first certified question, we reply, Yes where there has been no fraud or imposition;"

There is no distinction between the principle of that case and this one. The rules governing validity of a limitation clause under COGSA (Section 4(5)) have no more bearing on the validity of an agreed valuation clause under COGSA than the rules governing validity of a limitation clause under the Harter Act had on the validity of an agreed valuation clause under the Harter Act. The two clauses are entirely different; the rules governing one do not affect the other. Cases involving limitation clauses, governed by COGSA Section 4(5), have nothing to do with an agreed valuation clause or with this case.

C

The Fearful Spectre of the Carrier Rides Again.

While appellant endeavors (Br. 21-23), as in the court below, to suggest carrier domination in bill of lading matters, we shall not fill this brief with debate on issues of such questionable relevance to these proceedings. A reading of the appearances in the hearings before Congress will dispel such notions. The shipper and cargo interests, represented by such rather formidable organizations as the United States Chamber of Commerce, the National Association of Manufacturers, the Institute of American Meat Packers, the American Bankers Association, the Automobile Manufacturers Association and others, have been neither silent nor ineffective before legislatures or courts, at international conventions or in the day-by-day commercial transactions which determine the scope, content and effect of bills of lading. The contrary view is somewhat archaic and we regret its entry in these proceedings.

IV.

THE ISSUE OF "CUSTOM" IN THIS CASE.

The existence of a custom of long standing in the coffee trade to settle and pay claims on the basis of F.O.B. invoice value plus freight and insurance is established by Libelant's Answer to Request for Admission (Tr. pp. 24-28) and by Findings of Fact X and XI (Tr. 44-45).

Appellee acknowledges that, if COGSA had expressly or by necessary implication declared agreed valuation clauses invalid, or if Congress had indicated any intent or purpose to effect such a change in existing law and in the long established maritime rules and relationships, then no custom, however long established, could override a statutory prohibition. But COGSA neither expressly nor impliedly invalidates agreements on value and Congress obviously had no such purpose in mind.

The established custom does, we submit:

(a) show general acceptance and sanction of such agreements which fix the value to be used in calculating damages;

(b) illustrate how such agreements facilitate the determination of damages, whether in settlement negotiations or before a court or commissioner, without protracted dispute or extended evidence as to some less certain measure of value, such as market;

(c) indicate that appellant and its fellow members of the Pacific Coast Coffee Association, while urging and securing amendment of other sections of the Green Coffee Agreement, have not considered the provisions fixing value worthy of similar effort—

possibly because these provisions often work to cargo's benefit;

(d) illustrate the "collective bargaining" type of commercial relationships between strong economic groups which contrasts vividly with the picture appellant seeks to paint of poor, little "unorganized" cargo interests opposing big, predatory "organized" ocean carriers, and

(e) demonstrate that shippers, in practice, consider it sound to forego a speculative profit dependent upon the rise and fall of market in return for an absolute assurance of full return of all invested cost in the goods, landed at destination.

V.

THE FIRST AUTHORITATIVE DECISION ON AGREED VALUATION CLAUSES WILL BE BY THIS COURT.

In conclusion, we concur with appellant's observation (Br. 4): "there being no prior appellate decision on the precise point involved, the decision of this Honorable Court will be of great importance to everyone connected with the shipment and carriage of merchandise to and from United States ports in foreign commerce." The commercial and shipping interests here and wherever the Hague Rules apply throughout the world await the first authoritative decision on the question of agreed valuation clauses. In the *ESSO BELGIUM,* the Supreme Court would not permit the ocean carrier to put *into* the bill of lading contract, a clause which would have been *invalid* under the Harter Act, stating as its reason that no

purpose of Congress was shown to bring about a change in the prior law or in the long existing relationships between carriers and shippers. This court should not permit cargo interests to force *out* of the bill of lading contract a clause which was *valid* under the Harter Act, when no purpose of Congress is shown to bring about the same changes in prior law and relationships.

It is obvious that, in passing COGSA, Congress had no intention or even the slightest thought (in the words of the *ESSO BELGIUM*) of carving "out a special statutory exception to the general rule", and "indicated no purpose to bring about a change in the long-existing relationships and obligations between carriers and shippers which would be relevant to the validity" of agreed valuation clauses, and "nothing in either [the language and hearings of COGSA] persuades us that Congress intended to alter the Harter Act in any respect material to this controversy."

In this state of affairs, the following language of the Supreme Court in *Halcyon Lines v. Haenn Ship Ceiling Corp.,* 342 U.S. 282, 286, 72 S.Ct. 277, 96 L. Ed. 318, seems particularly appropriate:

> "Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integral whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees,

or casualty insurance companies desire such a change to be made."

That the decree of the District Court should be affirmed is

Respectfully submitted,
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Dated, San Francisco, California,
July 9, 1958.

No. 15,940

United States Court of Appeals

For the Ninth Circuit

Otis, McAllister & Co., a corporation,
Appellant,

vs.

Skibs, A/S Marie Bakke,
Appellee.

APPELLANT'S REPLY BRIEF.

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FILED
JUL 30 1958
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No. 15,940

United States Court of Appeals
For the Ninth Circuit

OTIS, McALLISTER & CO., a corporation, *Appellant,* vs. SKIBS, A/S MARIE BAKKE, *Appellee.*	

APPELLANT'S REPLY BRIEF.

Appellee's argument is built upon wish instead of fact. It states that there was (1) no new language in Cogsa affecting valuation clauses, and (2) no hint in the legislative history that a change in prior law was intended. From these false premises appellee draws the conclusion that the rule under the Harter Act continues to apply, and that the cases construing Cogsa are simply wrong. The erroneous statements of fact and theory by which appellee attempts to justify its position cannot evade the issue presented for decision.

I.

THE LANGUAGE OF COGSA ON WHICH APPELLANT RELIES IS NOT SIMPLY A REENACTMENT OF THE HARTER ACT.

Appellee professes to see no difference whatever between the two statutes which is material to the issues in

this case. Such wishful thinking cannot change the facts. The changes are there and they are substantial, as pointed out in our opening brief (pp. 7-10). One of the evils which Congress was asked to correct was the practice of using bill of lading clauses to restrict cargo recoveries to less than the full loss suffered. In Section 4(5) Congress enacted a statutory clause on valuation of cargo, thereby preempting the field and depriving the carriers of their pre-existing power to control the subject by bill of lading clauses. Having done that, Congress then made its intention clear by providing in 3(8) that no other device lessening the carrier's liability would be permitted. Regardless of appellee's claimed inability to understand it, the statutory change is clear and has been noted and applied by the cases cited in our opening brief.

On page 11 of its brief appellee states that "The decisions under the Harter Act have given meaning to the words reenacted in Section 3(8) of Cogsa and are applicable to the same words of Cogsa." Appellee cites as authority for this proposition *The Bill,* 47 F. Supp. 969, and *Spencer Kellogg & Sons v. Great Lakes Transit Corp.,* 32 F. Supp. 520. The references are incorrect and seriously misleading. Neither opinion discussed or mentioned 3(8) at all. Valuation clauses were not in issue. The cases merely held that the phrase "due diligence" should be given the same meaning in Cogsa as the identical phrase had in the Harter Act, a proposition with which we agree, but which is irrelevant to the present inquiry. Similarly, the *Esso Belgium,* 343 U.S. 236 (Br. 8), and *Scarburgh v. Compania Sud-Americana de Vapores,* 174 F. 2d 423 (Br. 11), cited by appellee in

support of the similarity between the two statutes, have meaning only when considered in light of the issues there involved. Neither case was concerned with 3(8) or 4(5), and the dicta quoted by appellee are comments of the most general nature, having nothing to do with the particular issues of this case. The dubious authorities which appellee cites emphasize the complete lack of case law in support of its theory.

II.

THE LEGISLATIVE HISTORY SHOWS THAT CONGRESS WAS CONCERNED WITH A GENERAL PROBLEM, AND DID NOT DIFFERENTIATE BETWEEN PARTICULAR CLAUSES.

Any discussion of legislative history should be unnecessary in this case, since the meaning of the Act is apparent from the language of Sections 3(8) and 4(5). The statute is not ambiguous. It prescribes in detail what the carrier can and cannot do. Reference to its history under such circumstances is neither necessary nor proper.

> *Ex parte Collett,* 337 U.S. 55, 69 S. Ct. 944, 959, 93 L. ed. 1207 (1949);
>
> *Gemsco v. Walling,* 324 U.S. 244, 65 S. Ct. 605, 89 L. ed. 921 (1945).

Nevertheless, we welcome the opportunity to discuss the history of Cogsa, since such discussion can demonstrate the artificiality of appellee's theories.

Appellee's approach to the problem of legislative history requires us to assume:

(1) that there is and was a distinct and well-recognized difference between "valuation" clauses and "limitation" clauses,

(2) that the two types of clauses, and the differences between them, were explained to Congress, and

(3) that Congress thereafter deliberately chose to outlaw one type but not the other, even where the effect of each would be the same.

Assuming that the requirements, operation and validity of valuation clauses, as opposed to limitation clauses, were ever clearly understood, there is no evidence that the distinctions were pointed out to Congress. In truth, it would have been difficult to do so, since those questions were still being litigated during and after the years when Congress held hearings on the proposed Hague Rules legislation. In deciding the *Ansaldo San Giorgio,* 294 U.S. 494, 55 S. Ct. 483, 79 L. ed. 1016 (1935), the Supreme Court was careful to leave open the validity of a valuation clause where no choice of rates was tendered. Later, in the *Ferncliff* litigation, the Court of Appeals for the Fourth Circuit was "divided and in doubt as to the validity of such a clause" even under the Harter Act, and found it necessary to certify the question to the Supreme Court. (See 306 U.S. at p. 447, 59 S. Ct. at p. 616, 83 L. ed. at p. 865.) What Congress *was* told at the hearings was that "valuation clause" questions were a fruitful source of litigation, to which the proposed Act would put a stop (Letter from Arnold W. Knauth to Hon. Schuyler O. Bland, reported in *Hearings before the Committee on Merchant Marine and Fisheries,* House of Representatives, 74th Congress, Second Session, on S. 1152, page 88). Mr. Knauth referred to the fact that at least 52 valuation clause cases had been contested in American courts during the preceding thirteen years, as compared

to only one such case in England under Hague Rules legislation. He pointed to the effect of the British Cogsa as having "swept all this sort of technical bickering into the scrap heap" and urged the adoption of the American Cogsa on the ground that he was weary of "seeing the merits of cases go unheard while we wrangle about new varieties of value, notice, and suit clauses" (*Hearings,* supra, p. 88).

To accept appellee's fairy tale version of congressional intent we must assume that Mr. Knauth was talking about a "limitation clause" when he used the phrase "valuation clause," and that Congress knew it. Such a suggestion is preposterous. Neither Mr. Knauth nor anyone else appearing at the hearings cited by appellee differentiated between types of clauses or intimated that the Act would strike at only half of the problem created by the various types then in use. It was the problem itself—the necessity of accepting less than full legal damages because of bill of lading clauses—of which cargo interests complained, and which Congress remedied in enacting the Hague Rules into law.

The following remarks, in addition to those of Mr. Knauth, show the need for and the intent of the proposed legislation as explained to Congress. The emphasis is ours but the words are taken from the hearings and reports:

1. In the Senate Committee hearing, on May 10, 1935, Mr. A. B. Barber of the United States Chamber of Commerce appeared in support of the bill and submitted a pamphlet setting out the proceedings of the 1930 Conference on Uniform Ocean Bills of Lading. The Conference

had analyzed the effect of the Hague Rules legislation as follows:

> "H. R. 3830 imposes a liability of $500 per package or customary freight unit upon the carrier, with the privilege of stipulating a higher *valuation* if agreeable to both parties, and no *valuation clause* will be valid which limits the carrier's liability to a sum less than that amount. *(Hearing before the Committee on Commerce,* United States Senate, 74th Congress, First Session, on S. 1152, page 37.)

2. During the 1936 hearings before the House Committee, a memorandum was submitted on behalf of the American Steamship Owners' Association stressing the advantages to be gained by shippers. One of these was described as "increased valuations":

> "*Valuation clauses* in bills of lading frequently restrict the recovery of the cargo owner to an *agreed valuation* as low as $100 per package.
>
> "Section 4(5) of the bill increases the *valuation* to $500 per package or per customary freight unit." (*House Hearings,* supra, p. 60.)

3. On page 8 of *House Report No. 2218,* submitted by the Committee following the hearings, Chairman Bland paraphrased the above language in referring to *"valuation clauses"* and *"agreed valuation."*

4. Mr. Barber appeared before the House Committee in 1936 and explained Section 4(5) as guaranteeing that shippers would recover $500 or the "actual value" of the goods, if less than that amount:

> "That does not mean they will get $500 for every package, *but they will get the value, if it is within $500 . . ." (House Hearings,* supra, p. 25).

5. Before taking testimony from the witnesses in 1936, the House Committee received an official memorandum from the Department of Commerce. That lengthy statement analyzed the "maximum value" feature of the bill and concluded that it

> *"prohibits the fixing by contract of even the actual value if that is under $500" (House Hearings,* supra, p. 14).

The Commerce Department memorandum, unchallenged by any carrier representative, advised the Committee that Cogsa would prohibit the very type of clause which appellee now seeks to defend.

Appellant submits that the climate in which Congress enacted Cogsa becomes clear from the foregoing references. The difficulty with which a shipper could determine his rights, because of the multitude of clauses appearing in fine print, was explained to the Committees and to Congress *(House Hearings,* supra, pp. 2, 8-9, 25; *House Report,* supra, pp. 6-7). One type of such clause, indiscriminately referred to by the terms "valuation," "limitation," "agreed value," and "limit of liability," was that which prevented the shipper from recovering his full legal damages. Congress was told that such clauses were a continual source of trouble to the shipper and the courts, which the passage of Cogsa could be expected to cure. It was explained that the new Act protected the carrier against liability in excess of $500 per package. Up to that amount the shipper was guaranteed his full actual loss and contractual stipulations regarding value were prohibited.

Appellee's reliance on the lack of particular discussion regarding 3(8) is misplaced. That section, *by itself,* is meaningless. Only when it is related to 4(5) and other *definitive* sections of the Act does it take on meaning at all. Then it becomes clear that 4(5) was to be *the* valuation clause and that all others which "lessened" the carrier's liability were prohibited.

III.

APPELLEE'S CLAUSE IS NOT THE SAME AS THAT APPROVED IN THE FERNCLIFF.

Implicit in appellee's argument that this case is controlled by the *Ferncliff* and other Harter Act decisions is the assumption that its clause is the same as those in use prior to Cogsa. Actually there is a difference, and the difference emphasizes the change wrought by the 1936 Act. The *Ferncliff* clause provided simply for a valuation based on invoice plus disbursements. Presumably the consignee would be paid on the basis of the invoice, no matter what the price. Appellee's bill of lading, however, is not so simple (Tr. 36). Clause 17 says that goods worth more than $500 per package are valued at $500, while clause 18 says that goods worth less than $500 per package are valued at invoice plus charges. In other words, appellee recognizes the Cogsa valuation scheme when it would work to its own advantage, but seeks to avoid it when cargo might benefit.

Congress could not have intended the valuation provisions to be a one-way street. One of appellee's own cases, *The Bill,* 55 F. Supp. 780 (Br. 21-23), held that a valuation clause could not be given effect when to

do so would afford *cargo* an advantage in conflict with the Act. By the same token this Court should not allow the *carrier* to gain an advantage by a clause not authorized by the Act.

The wisdom of Congress in enacting a standard valuation clause and outlawing all others is remarkably portrayed by the complex language of clauses 17 and 18, and by the example appearing on page 6 of appellee's brief. Appellee states that if the market value at destination is either $450 *or $530,* clause 18 would be applied to fix a value of $490 for the purpose of calculating damages. That is an obvious error, since clause 18 by its own terms can never apply where the actual value is over $500. It typifies the pitfalls against which Cogsa protects. What chance has the consignee to understand a bill of lading when the carrier's own counsel cannot?

IV.

APPELLEE CITES NO CASES DEALING WITH THE VALIDITY OF AN INVOICE VALUE CLAUSE UNDER COGSA OR WITH THE MEANING OF "LESSEN" LIABILITY AS USED THEREIN.

Appellee makes no effective answer to the Cogsa cases, all of which are against it.

A. The valuation clause cases.

Only two decisions have passed on the validity of valuation clauses under Hague Rules legislation. Both squarely hold such clauses invalid. They are *The Harry Culbreath,* 1952 A.M.C. 1170, and *The Cape Corso,* 1954 Lloyd's Law List Reports, Vol. II, p. 40, discussed in our opening brief on pages 15 through 19. Appellee,

finding no contrary holdings, states merely that these cases are wrong, and that the decision of the District Court herein is entitled to greater weight.

We invite the Court to compare the *Harry Culbreath* and *Cape Corso* opinions with those of Judges Hamlin and Goodman below. The reasoning in the *Harry Culbreath* is set forth in an eight-page opinion which discusses virtually all of the cases appearing in the briefs on file herein. Three years later the Vancouver judge in the *Cape Corso* reached the same decision by the same logical route, reasoning independently of the *Harry Culbreath,* which apparently was not cited to him. By contrast, Judge Hamlin's law and motion order, overruling exceptions to the answer, contains but a single sentence dealing with clause 18 (Tr. 30), while Judge Goodman's approach to the case is indicated by this statement that "It would be unseemly to, in effect, reverse the decision of a brother judge" (Tr. 40). Neither judge below cited or discussed any authorities on the point at issue.

Appellee (Br. 21) seeks to dismiss the Supreme Court dictum in *The Ferncliff,* to the effect that valuation clauses are regulated by Cogsa, by pointing out that the words used are those of District Judge Chestnut. In our view it is significant that the Supreme Court believed those words worthy of repeating, especially after it complimented the District Judge on his "careful opinion" (306 U.S. at p. 449, 59 S. Ct. at p. 617, 83 L. ed. at p. 866).

Again on page 21, appellee is in error in attributing to Judge Chestnut language said to be in apparent con-

flict with his definite statement that valuation clauses were governed by Cogsa. Whatever is meant by the quoted language ("Notwithstanding the passage of the Carriage of Goods by Sea Act . . .") the words are not those of Judge Chestnut, as stated by appellee, but appear in the Statement of Facts certified by the Court of Appeals (306 U.S. at p. 447, 59 S. Ct. at p. 616, 83 L. ed. at p. 865). They are therefore useless in interpreting Judge Chestnut's intent or for the purpose of weakening the effect of his clear dictum which was adopted by the Supreme Court and relied upon in subsequent decisions.

B. The cases on the meaning of "lessen such lability".

One of the few realistic statements in appellee's brief is the admission (pp. 25-26) that it would be useless to discuss *The Campfire,* 156 F. 2d 603, or *The Exiria,* 160 F. Supp. 956, 1958 A.M.C. 439. We agree that it would be useless from appellee's viewpoint, since those cases stand unchallenged as holding that the "lessening" prohibited by 3(8) includes a lessening of the dollar amount which the carrier has to pay. Appellee meets this obstacle by closing its eyes. If a pro-rata clause lessens liability, so does the invoice value clause, and appellee cannot avoid that conclusion by the lame statement that those decisions "have nothing to do" with this case (Br. 27).

C. Appellee's authorities.

Appellee cites two Cogsa cases involving bill of lading clauses affecting measure of damages. They are *The Steel Inventor,* 35 F. Supp. 986, and *The Bill,* 55 F. Supp. 780 (Br. pp. 21-23). It is difficult to understand what comfort

appellee derives from either. In *The Steel Inventor* Judge Chestnut was careful to express no opinion on the validity of a valuation clause, even by way of dictum, since the point was not necessary to the decision of that case. The clause involved was void even under Harter Act principles. In *The Bill,* as discussed earlier herein (supra, pp. 8-9), he held that a valuation clause would not be permitted to override the express provisions on the subject of recoverable damages which appear in the Act.

Appellee cites no cases upholding any valuation or limitation clause in a Cogsa bill of lading, or casting any doubt on the statutory construction found in *The Harry Culbreath, The Cape Corso, The Campfire* or *The Exiria.* Instead, it resorts to vague implications such as ''The meaning of the words of Cogsa as interpreted by the Supreme Court does not invalidate agreed valuation clauses'' (Br. 3). No reference appears to the case or cases appellee had in mind in making that statement. Actually *The Ferncliff* is the only Supreme Court decision which has ''interpreted'' the effect of Cogsa on valuation clauses, and the language in that opinion is in appellant's favor.

The text authorities cited by appellee (Br. 25) require brief comment. Mr. Knauth, gratuitously described as the ''leading authority'' on ocean bills of lading in the United States, is well known to be a champion of shipowner interests whose published comments, though often wrong, seldom err in favor of cargo. For example, his Second Edition, published in 1941, stated that both the pro-rata clause and the both-to-blame clause were valid under Cogsa (*Knauth on Ocean Bills of Lading,* 2d ed. pp. 157-

160, 208). On these clauses, of course, he was proved wrong by *The Campfire* in 1946 and *The Esso Belgium* in 1952. It would seem that history is repeating itself, this time with regard to the invoice value clause. In his current edition Mr. Knauth, while expressing his personal opinion in favor of the clause, admits that the cases are going against him:

> ". . . several district courts have regarded the invoice value clause as a device 'lessening' the carrier's liability in contravention of Cogsa Section 3(8). . . ." (*Knauth,* supra, 4th ed. p. 279).

Appellant submits that Mr. Knauth's opinions, admittedly contrary to the case law, are worthy of no weight whatsoever in view of his 1936 statement to Congress that Cogsa would sweep into the scrap heap all technical bickering over forms of valuation clauses (*House Hearings,* supra, p. 88).

The Fourth Edition of *Poor on Charter Parties and Ocean Bills of Lading,* relied upon by appellee, conflicts with the Third Edition, published in 1948. The earlier work, revised by Raymond T. Greene, referred to valuation and limitation clauses on page 160, stating that:

> "Prior to 1936 the courts enforced both types of clauses and if the bill of lading were not subject to the Carriage of Goods by Sea Act would presumably still do so."

Further discussion is concluded on page 162:

> "The type of clause approved by the *Ferncliff* decision would seem to be prohibited by the Carriage of Goods by Sea Act."

The only judicial development in the ensuing six years was *The Harry Culbreath* in 1952, which made a prophet of Mr. Greene. Yet in his Fourth Edition, published in 1954, Mr. Poor offers the following (at p. 184):

> "It is to be *hoped* that this clause will not be held invalid under Section 1303(8)." (Emphasis added.)

Mr. Poor is too conscientious a lawyer to publish the above wish as an opinion. His expression of it as a "hope" is consistent with his position as a partner in the noted New York admiralty firm of Haight, Gardner, Poor and Havens, which engages primarily in the representation of shipowners' interests. It is only natural for Mr. Poor to defend the invoice value clause, since his partner, Mr. Charles S. Haight, was on the committee which drafted the original clause and recommended it to various steamship lines in 1937 (see *Knauth,* supra, 4th ed., pp. 93, 106-107).

The manner in which Mr. Knauth and Mr. Poor express their comments brings them within the scope of the Supreme Court warning that

> "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." (*The Paquete Habana,* 175 U.S. 677, 700, 20 S. Ct. 290, 299, 44 L. ed. 320, 329 (1900).)

The final authority on which appellee relies is *The Carriage of Goods by Sea Act, 1924* published in 1932 by A. J. Hodgson. The author was writing in reference to the English statute, some four years before Cogsa was

enacted, and at a time when, to our knowledge, there were no cases on the validity of valuation clauses under The Hague Rules. For a more recent statement by an English author we refer to *Cole: The Carriage of Goods by Sea Act, 1924,* 4th ed. 1937, which analyzes the intent of 4(5) as follows (p. 85):

> "Under the above Art. IV, 5, of the Rules, a loophole which existed in the Harter Act and similar legislation (with the exception probably of the Canadian Act) was closed. The Rules in effect embody a suggested amendment of the Harter Act which was the subject of discussion in American shipping circles. The object of this amendment was to negative decisions of the American courts that, notwithstanding the provision in the Harter Act declaring it illegal for shipowners to contract out of liability, it was nevertheless lawful for the parties to agree upon a value for the goods, by which means shipowners effectively limited their liability for losses to cargo."

Additional English comment is found in the latest edition of *Scrutton on Charterparties and Bills of Lading,* 16th ed. (1955), pp. 480-481, where the author states that agreed value clauses "would appear to lessen the maximum liability provided by Art. IV, Rule 5, and thus to be rendered null and void" by Art. III, Rule 8 (Section 3(8) of Cogsa).

To summarize appellee's authorities, they consist of (1) no cases involving invoice value clauses under Cogsa or construing the phrase "lessen such liability," (2) three text writers: Mr. Knauth, who admits the cases to be against him; Mr. Poor, whose Fourth Edition conflicts with his Third; and Mr. Hodgson, writing in England four

years before Cogsa was passed. If these be "authorities" at all, surely they must yield to the square judicial holdings with which they conflict.

The existence of prior decisions by other Courts on the very clause at issue points up a practical problem involved in this appeal. Unless the decision below is reversed, it will be possible for a vessel to discharge shipments at Vancouver, San Francisco and New York under identical bill of lading clauses which would be valid here but void in the other two jurisdictions. Such a situation would promote forum shopping, would destroy the uniformity which the Rules and the Act were designed to achieve, and should be avoided if reasonably possible.

V.

THE CUSTOM DEFENSE HAS DISAPPEARED FROM THE CASE.

At the pleading stage and at the trial, appellee insisted that an alleged "custom" of invoice value settlements afforded it a separate and independent defense, regardless of the validity of clause 18 in the bill of lading. Appellee now admits (Br. 28) that its stand was untenable, and that no custom can override a statutory prohibition. The custom argument has, therefore, disappeared from the case, in spite of appellee's claim that it somehow shows how wonderful invoice settlements are and how happy everyone is with them. Cargo interests are not happy or this case would not be here, nor would the American Institute of Marine Underwriters have moved

for leave to file a brief as amicus curiae. It should be sufficient to note that whenever an invoice value or similar clause has been attacked in court, the attack has come from the side of cargo. Moreover, the inferences which appellee seeks to draw on pages 28 and 29 of its brief are patently irrelevant, since the feelings of a group of West Coast coffee carriers and importers can hardly bear on the intent with which Congress passed the Act in 1936.

VI.

A DECISION FOR APPELLANT WILL EFFECTUATE CONGRESSIONAL INTENT AND ACHIEVE UNIFORMITY UNDER COGSA AND THE HAGUE RULES.

It is a fact, and not an "archaic" suggestion as labeled by appellee (Br. 27), that the content of bills of lading is dictated by the carriers. That is only natural, since the carriers prepare the forms. The authorities quoted on pages 21 through 23 of our opening brief recognize the continuing truth of that fact in connection with post-Cogsa bills of lading. If additional evidence is required, one need only refer to appellee's own bill of lading (Tr. 36). Of its twenty-nine numbered paragraphs, *not one* bestows a right, benefit or privilege upon the shipper or consignee. All were drafted for the carrier's advantage, in language which methodically claims for the ship every benefit possible under the law, and more, including the admittedly void "both-to-blame" and "pro-rata" clauses (clauses 9 and 17). There is no bargaining over bill of lading clauses when a shipment is tendered. The carrier

will permit none, lest it be charged with discriminating between shippers.

Appellee's reference to the trade associations which have supported shippers' interests betrays a lack of perspective. Their part in the play is finished; they have left the stage. It was their function to generate the pressure for statutory reform and to acquaint Congress with the complaints and desires of their members. This they have done and done well, but the lobbyist is of no value to his client in the "day-by-day commercial transactions" of his business. The Chamber of Commerce can argue the shipper's cause before Congressional committees, but it cannot hold his hand when he appears at the steamship office and asks for his bill of lading. When those who draft the bills of lading persist in relying on invalid clauses, it is to the courts that the consignee must turn to secure the relief guaranteed him by the 1936 Act.

By its reference to *Halcyon Lines v. Haenn Ship Ceiling Corp.*, 342 U.S. 282, 72 S. Ct. 277, 96 L. ed. 318, and *The Esso Belgium* (Br. 30), appellee intimates that there is a parallel between those cases and this. That is not true. The statutes there involved, and their legislative history, were utterly wanting in any hint of Congressional intent on the points at issue. Under those circumstances it would have been judicial legislation for a Court to read into the statutes things which were not there and had not been considered. Contrast that situation with what exists here. There is no mystery about the effect of Cosga on valuation clauses. The effect is stated in the Act and is made doubly apparent by the legislative history. In that setting this Court has not only the right but the duty to

declare clause 18 invalid. That decision, by bringing the law in this Circuit into agreement with the rules already announced in New York and Canada, will insure the federal and international uniformity so clearly intended by the Carriage of Goods by Sea Act and the Hague Rules.

Dated, San Francisco, California,
July 30, 1958.

Respectfully submitted,
LLOYD M. TWEEDT,
CARTER QUINBY,
DERBY, COOK, QUINBY & TWEEDT,
Proctors for Appellant.

No. 15942

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Richard Douglas Furnish and Emilie Furnish [illegible],

Petitioners and Appellants,

vs.

Commissioner of Internal Revenue,

Respondent and Appellee.

Petition to Review a Decision of the Tax Court of the United States.

APPELLANT RICHARD DOUGLAS FURNISH'S OPENING BRIEF.

FILED

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No. 15942

IN THE

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FOR THE NINTH CIRCUIT

RICHARD DOUGLAS FURNISH and EMILIE FURNISH FUNK,

Petitioners and Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

APPELLANT RICHARD DOUGLAS FURNISH'S OPENING BRIEF.

Statement of the Case.

This is an appeal from the decision of the Tax Court of the United States, adjudging the petitioner Richard Douglas Furnish indebted to the United States for deficiencies in income tax and additions to tax for fraud, exclusive of interest, as set forth in the following table:

Year	Deficiency	Addition to Tax for Fraud	Total
1939-42	$ 35,284.58	$ 17,647.29	$ 52,931.87
1943	25,063.13	12,531.56	37,594.69
1944-48	266,856.01	135,509.77	402,365.78
1949	5,577.02		5,577.02
	$332,780.74	$165,688.62	$498,469.36

[Tr. of R. pp. 112-113.]

NOTE: (The Hill Audit is referred to in the Transcript of Record as Exhibit 5, whereas it should be designated as Exhibit V.)

Jurisdiction.

The jurisdiction of this Court is invoked under Title 26, United States Code, Section 7482(a), (b)(1).

The pleadings relied on are Petitions, Answers, Amendments to Answer, Replies, Petition for Review, Statement of Points on Appeal, under Docket Nos. 51416 and 51417, and Transcript of Proceedings. [Tr. of R., pp. 15-27, 28-51, 55-58, 58-63, 72-74, 69-70, 116-118, 124, 125-491.] The tax returns for the years involved were filed with the Collector for the Sixth District of California. [Exs. A to I.]

Statement of Facts.

Richard Douglas Furnish, hereinafter called petitioner, practiced medicine during the years in question in Los Angeles, California. Returns for the years involved herein were filed with the Collector for the Sixth District of California. [Petitions and Answers, Exs. A to I, Tr. of R., p. 126.]

The returns for the years 1939 to 1942 inclusive were signed by both petitioner and his wife. [Exs. A and B, Tr. of R., p. 126.]

Mrs. Funk (formerly Mrs. Furnish) was granted an interlocutory decree of divorce from the petitioner on December 11, 1944. [Tr. of R., p. 149.]

Herman Duelke was business manager for petitioner from November 1, 1945 until May, 1947. At petitioner's instructions, he purchased the Hinton Arms Apartment house at Sixth and Hobart for petitioner, taking title in his name so he could handle all papers if there were a sale. The money to purchase the property was given by petitioner to Mr. Duelke, and Mr. Duelke gave a quit-

claim deed in blank to petitioner. Shortly before May, 1947 Mr. Duelke called Edward Anspach and executed an agreement of sale under a power of attorney, without notifying the petitioner. The petitioner was disturbed about the transaction when he learned of it, and Mr. Anspach learned the next week that Mr. Duelke's employment was terminated. Mr. Anspach suggested that Mr. Duelke go into the real estate business. Mr. Duelke denied the transaction and conversation with Mr. Anspach. [Tr. of R., pp. 162-165, 389-392, 451-458.]

Following petitioner's instructions, Mr. Duelke purchased property at 5718 Hollywood Boulevard for the petitioner, taking title in his name and giving a quitclaim deed signed in blank to the petitioner. Approximately $25,000.00 was deposited in escrow to purchase this property and this amount was turned over to Mr. Duelke by petitioner in currency of small denominations. [Tr. of R., pp. 165-166.]

Petitioner also owned an interest in property located at 57th and Hoover Streets although title was held in the name of R. (Rene) M. Scanlan, an aunt of petitioner. This interest was sold to Dr. Boris Levin in September 1946 for a consideration of $7,525.00, with expense of sale of $193.13. Mr. Duelke represented the petitioner at the escrow proceedings on the sale of this property. The proceeds from the sale of this property were paid by check drawn to the order of Mrs. R. (Rene) M. Scanlan and turned over to Mrs. Scanlan. This same check endorsed by Mrs. Scanlan was later given to Mr. Duelke by the petitioner to pay for architectural work done on the 5718 Hollywood Boulevard property owned by petitioner. The property at 57th and Hoover Streets was

owned by petitioner; he eventually received the proceeds of the sale of such property, yet failed to report the gain on such sale on his income tax returns. The cost of such property to petitioner was $3,938.83. [Tr. of R., pp. 167-169, 275; Stip. of Facts, par. 3(a)(1)-(a)(4); Pet. Ex. 1, Schedule 4; Ex. F.]

The petitioner acquired property at 401 North Vermont in April 1944. The funds used to purchase this property were advanced by or for petitioner through a Dr. Gideon Ramseyer and title was placed in Dr. Ramseyer's name at the start of the escrow. Petitioner had Dr. Ramseyer sign a quitclaim deed. The total purchase price for such property was $42,195.15. Before the close of the escrow, title was transferred to the name of Elodia Sullivan. [Stip., par. 3(c)(1); Pet. Ex. 1, Schedule 4; Tr. of R., pp. 197-203.]

Title to the 401 North Vermont property was still held in the name of Elodia Sullivan when the property was sold in May 1948 for the contract price of $131,500.00. The cost of such sale was $6,879.70. [Stip., par. 3(c)(2).]

Elodia Katherine Sullivan, former employee of petitioner, has known him since 1931. She married in 1944 and her name became Douglas. She was divorced in 1949. [Tr. of R., pp. 224-227.]

Elodia Katherine Douglas, nee Sullivan, received $37,-120.30 in currency and a note in the amount of $87,500.00 secured by a trust deed upon the sale of the property in 1948. The note was paid off in currency including interest in January of 1949, amounting to approximately $90,000.00. Mrs. Douglas was acting for and under the

instructions of petitioner in taking title to the property in her name and receiving the proceeds from the sale thereof. [Stip., par. 3(c); Tr. of R., p. 209.]

The long term capital gain from the sale of the 401 North Vermont property and the interest received on the note were reported on a 1948 income tax return filed under the name of Elodia Sullivan. While Mrs. Douglas, nee Sullivan, was living at 3807 W. Sixth Street, Los Angeles, at the time, the return was filed under the address 1715 Micheltorena, Los Angeles. This was the home address of Eugene Scanlan, a relative through marriage and a patient of petitioner. [Ex. M; Tr. of R., pp. 205-209, 230, 305.]

In 1947, acting under petitioner's instructions, Mrs. Douglas purchased for him in her name 1000 shares of Thomas Steel Company common stock. In 1948, following petitioner's instructions, Mrs. Douglas purchased for him in her name an additional 1000 shares of Thomas Steel Company common stock from the proceeds of the sale of the 401 North Vermont property. [Pet. Ex. 1, Schedule 3; Tr. of R., pp. 210-211, 214.]

The dividends received in 1948 on the Thomas Steel Company common stock were received and reported by Mrs. Douglas on a 1948 income tax return filed under the name of E. Kathryn Douglass. On this return Mrs. Douglas listed her correct address of 3807 W. Sixth Street, Los Angeles. [Ex. L; Tr. of R., pp. 207, 210-211, 229-230.] Dividends were also paid on this stock in 1947 and 1949. [Tr. of Rec., pp. 220, 229-230; Standard and Poor's Corporations, 1947 Annual Dividend Record.]

The major portion of the proceeds from the sale of 401 North Vermont, amounting to approximately $127,000.00

in currency, was distributed by Mrs. Douglas at petitioner's instructions as follows:

$45,000.00	(Check to Bernard Lippman)
20,000.00	(Check to Bernard Lippman)
1,837.52	(State income tax on sale of 401 North Vermont as reported by Mrs. Douglas)
17,953.45	(Federal income tax on sale of 401 North Vermont as reported by Mrs. Douglas)
19,953.65	(Purchase of 1000 shares of Thomas Steel Company common stock)
10,000.00	(Loaned to Dr. Gideon Ramseyer)

[Ex. N; Tr. of R., pp. 211-214; Ex. 1, Schedule 3; Ex. B of Ex. 1.]

Petitioner caused the titles to his property known as the Hinton Arms on Hobart and Sixth Streets and the property at 5718 Hollywood Boulevard to be transferred to the name of Mrs. Douglas. [Tr. of R., pp. 216-217.]

Mrs. Douglas transferred title to this property and to the Thomas Steel Company stock to the petitioner after her question and answer statement to the Internal Revenue Service in November 1949. [Tr. of R., pp. 217, 220.]

The checks for $45,000.00 and $20,000.00 were given to Lazard Lippman by petitioner. They were deposited in the San Pedro bank account of Bernard Lippman on March 15, 1949. On March 24, 1949, Bernard drew a check on his account for $65,000.00 payable to his brother, Lazard. Lazard then cashed this check in San Pedro, receiving currency in twenty dollar denominations. This currency was then delivered to petitioner by Lazard. The Lippmans participated in this transaction solely as an accommodation to the petitioner who wanted the checks

cashed out of town and wanted to receive currency in small denominations. [Tr. of R., pp. 232-234, 334-336.]

Petitioner acquired real property at Florence Avenue and Crenshaw Boulevard, Los Angeles, in 1944, at a cost of $25,737.31. The purchase negotiations were handled by John LeGrand, a friend of petitioner, and title to such property was taken in the name of C. T. Scanlan, a cousin of petitioner. [Stip., par. 3(b)(1); Tr. of R., pp. 296-297; Ex. 1, Schedule 4.]

The Florence and Crenshaw property was sold in 1947 for $60,000.00, with costs of $11,568.45. C. T. Scanlan received the proceeds of the sale and turned them over to petitioner. The gain on the sale of this property was reported on the 1948 income tax return filed by C. T. Scanlan and petitioner paid C. T. Scanlan in cash for the amount of tax due to including such sale in Scanlan's return. [Stip., par. 3(b)(2); Ex. P; Tr. of R., pp. 305-307, 311.]

By the use of nominees to report the gains from the sale of the 401 North Vermont and Florence and Crenshaw properties a smaller income tax was paid than would have been paid if the petitioner had included the capital gains in his income tax returns. The "25% capital gains" tax does not necessarily apply to all capital gains, it depending on the amount of total taxable income of the taxpayer. [Ex. U.]

John LeGrand purchased stock of the Suburban Hospital for the petitioner in 1943 and 1944, receiving currency in small denominations from the petitioner for the purchase. Title to this stock was taken in the name of C. T. Scanlan. [Tr. of R., pp. 295-297, 300-301; Ex A of Ex. 1.]

Petitioner acquired stock in the Parkview Hospital in 1942. This stock was placed by petitioner in the name of G. E. Flowers, his former employee. The following dividends were paid on the stock of Parkview Hospital to petitioner or his nominee:

1944	1946	1947
$2,000.00	$2,500.00	$250.00

Petitioner failed to report these dividends in the returns filed for such years. [Ex. T; Tr. of R., pp. 338-345; Exs. R, S, D, F, G.]

Petitioner followed the practice of sending patients' checks to his sister in Kansas City where she cashed the checks and accumulated the currency for petitioner. Some time prior to 1946 the accumulated currency amounting to approximately $25,000.00 was returned to petitioner by express. Petitioner continued the practice of sending patients' checks to his sister to be converted into currency, and in the latter part of 1947 the petitioner's sister personally returned an additional $25,000.00 in accumulated currency to him. [Tr. of R., p. 161; Ex. J.]

Petitioner carried bank accounts in the names of employees and relatives. The accounts carried in the name of Mr. Duelke carried the capacity of Mr. Duelke as business manager or trustee, and the petitioner's business address was used as the address of Mr. Duelke. There were small accounts in the names of relatives. [Schedule 2 of Ex. 1; Tr. of R., pp. 185-186.]

At the start of the investigation of petitioner by agents of the Internal Revenue Service in January of 1949, the petitioner stated to the special agent that he never bought or sold any real estate in California at any time, nor had he asked anyone else for the use of their name in the

purchase or sale of a parcel of real estate. In fact the petitioner had engaged in numerous real estate transactions buying and selling property through nominees, and at the time of the interview owned three pieces of property held in the names of nominees. [Tr. of R., pp. 353-354; Ex. 1, Schedule 4.] However, the petitioner's 1946 tax return showed a sale of real property known as the Bonnie Brae Medical Building. [Tr. of R., p. 393.]

During the same interview, when confronted with this 1946 income tax return showing income from rents from the Hinton Arms Apartment (3807 W. Sixth Street, Los Angeles), petitioner stated to the special agent that he did not own the Hinton Arms Apartment, that it was the property of his business manager, Mr. Duelke, and that he had leased it from his business manager. In fact the petitioner was the real owner of the Hinton Arms and Duelke was the mere nominee of petitioner. [Tr. of R., pp. 354-355, 163, 195-196; Ex. 1, Schedule 4.]

Mr. Duelke tried to install a record system, but petitioner would not allow him to do so. [Tr. of R., pp. 173-174.]

Mr. Duelke claimed that petitioner told him he had removed his records when he had been investigated by the Bureau of Internal Revenue previously, but in fact a previous investigation by the Bureau of Internal Revenue was a 1948 audit covering the tax year of 1945, on account of alimony paid by the petitioner; and there had been an audit in 1945 for the years 1943 and 1944 that did not result in a change of the tax liability for those years. [Tr. of R., pp. 175-176, 322, 433-434, 437-438.]

No set of books adequately reflecting income was maintained by the petitioner. In the initial stages of the in-

vestigation, the agents attempted to determine petitioner's correct income from payments disclosed by patient history cards maintained in petitioner's office. It became apparent to the agents that not all the cards were available. When questioned concerning this, the petitioner stated to the agents that certain files were lost in moving the petitioner's office. Subsequently petitioner hired an attorney who stated that it was to the interest of his client to cooperate with the government and that there would be no longer a claim of lost files. All the files were then made available to the investigating agents. [Tr. of R., p. 357.]

Petitioner's attorney employed a certified public accountant, Harry K. Hill, to make an audit for the purpose of determining as nearly as possible the amount of gross income received by petitioner from his patients over the years 1939 to 1948, inclusive, as disclosed by the patient record cards maintained in petitioner's office. A typical patient record card contained the name of the patient, the medical history and treatment afforded the patient, and the amounts and dates of payments made by the patient. These cards were used by petitioner's office staff as the basis of preparing bills sent out to the patients. [Tr. of R., pp. 357-358, 367-368, 467-469, 479.]

Mr. Hill, in making his audit, examined the patients' record cards. He consulted with Mrs. Wheeler, and on a few cards with Dr. Furnish, according to Revenue Agent Mr. Ness. [Tr. of R., pp. 409-410.]

Mr. Hill's report was turned over to the Internal Revenue Service by petitioner's attorney. Agent Ness made a check on Mr. Hill's report as follows:

In Transfer File No. 1 he checked 75 cards in the letters A and B, of which there were 700, and did not check

the rest of the alphabet; in Transfer File No. 2 he checked 200 cards in the letter P, of which there were 1,200, and did not check the rest of the alphabet; in Transfer File No. 2A he checked 150 cards in the letter E, of which there were 1,300, and did not check the rest of the alphabet; in Transfer File No. 3 he checked 200 cards in the letters A and C, of which there were 600, and did not check the rest of the alphabet; in Transfer File No. 4 he checked 150 cards at random, of which there were between 1,200 and 1,300; in Transfer File No. 4A he checked 50 cards at random, of which there were between 900 and 1,000; in Transfer File No. 5 he checked 75 cards at random, of which there were 500. [Tr. of R., pp. 397-399.]

The gross receipts derived by the petitioner from his medical practice for the years 1939 to 1948 inclusive, as disclosed by the Hill Report, and as compared to the gross receipts from his patients, as reported by petitioner in his income tax returns, are as follows:

Year	Gross Receipts Reported	Gross Receipts Per Hill Report
1939	Return unavailable	$ 17,720.88
1940	Return unavailable	27,734.16
1941	$ 20,826.00	48,685.06
1942	25,642.00	66,252.56
1943	21,374.46	106,558.90
1944	26,521.50	107,230.58
1945	41,188.31	93,621.83
1946	55,493.08	141,542.82
1947	32,831.11	110,695.16
1948	57,330.03	81,892.84

[Exs. V, A-H.]

A net worth statement reflecting assets, liabilities and nondeductible expenses of petitioner for the years 1939 to 1948 was prepared by petitioner's accountant. This statement was introduced by petitioner at the trial and petitioner contends that such net worth statement is true and correct. Petitioner's net income for the years 1939 to 1948 reflected by such statement as compared to the net income reported by petitioner in his income tax returns, is as follows:

Year	Net Income Reported	Net Income per Petitioner's Net Worth Statement
1939	$ 4,555.56	$30,773.28
1940	5,615.83	58,541.04
1941	7,632.84	55,529.22
1942	8,477.53	56,770.86
1943	6,884.68	55,685.22
1944	12,134.10	19,728.82
1945	26,950.18	53,847.59
1946	18,212.16	50,666.92
1947	115.81	74,389.45
1948	17,828.99	73,922.44

[Stip., par. 4, 5; Exs. 1, 2; Exs. A-H, X, Y; Tr. of R., pp. 375-376.]

The net worth statement submitted by petitioner does not make the proper adjustment for two automobiles, one Pontiac and one Ford, which were disposed of by petitioner. The petitioner made a gift of the Ford, which had cost him $500 in 1941. While this asset was dropped from his net worth statement, it was not included as a gift in the nondeductible expenditures schedule. Thus, net income of 1941 should be increased by $500.00. The Pontiac, which had cost petitioner $900.00, was trans-

ferred to petitioner's wife in 1944 under the property settlement agreement. Petitioner's net worth statement should be adjusted to reflect this item in the nondeductible expenditures schedule in 1944, thus increasing net income of 1944 by $900.00. [Ex. 1, Schedule 5, Item (3); Ex. 3, par. 2; Tr. of R., pp. 276-278, 326-328.]

Petitioner's net worth statement properly reduces net income of 1944 by deducting $10,800.00, representing cash payments to petitioner's wife under the property settlement agreement. Respondent contends that petitioner's net worth statement improperly reduced the net income of 1944 by deducting the $10,800.00. [Ex. 1, Item (1), Schedule 1, p. 1; Tr. of R. pp. 379-382.]

Petitioner's net worth statement does not reflect the gift by petitioner to Mrs. Douglas of the dividends on the Thomas Steel Company common stock. This gift amounting to $2,592.00 should be added to petitioner's nondeductible expenses schedule for 1948, thus increasing net income for 1948 by this amount. [Ex. 1, Item (3); Tr. of R. pp. 329, 210, 220.]

Petitioner graduated from medical school in 1925 and practiced in Florida until 1931. Internal Revenue records in Florida reveal that petitioner filed no returns for 1925, 1926, 1927, 1930 or 1931 and that he filed returns for the years 1928 and 1929 showing no tax due. In 1931 one of petitioner's automobiles was repossessed. Petitioner and his family then moved to Scoby, Montana, a small town where petitioner practiced for approximately two years. [Tr. of R. pp. 140-142, 155; Ex. Z.]

For the next two years, petitioner traveled extensively engaging in the business of selling serums, the principal serum being used for the injection treatment of hernia. During this period of time, petitioner's family moved to

Los Angeles where his wife rented an inexpensive house and purchased secondhand furniture. In order to support the family, petitioner's wife had to invest the small proceeds she had received from her father's insurance in purchasing medicine that was sold from the home. Petitioner's wife was unable to keep up the payments on the secondhand furniture which was repossessed. Petitioner then joined his family in Los Angeles and they moved to a furnished two bedroom apartment which was rented for $35.00 a month. Petitioner, his wife and four children lived in that apartment for several years, until he purchased a residence at 121 Highland Avenue. Petitioner borrowed $1000.00 to make the down payment on the house in December 1938. [Tr. of R. pp. 142-144, 444-445; Ex. "D" of Ex. 1.]

The petitioner commenced the practice of medicine in Los Angeles in 1936. Due to the fact he was not a member of the Los Angeles County Medical Association the petitioner had difficulty in securing hospital facilities for his patients. In 1942 and 1943 petitioner finally acquired interests in two hospitals. [Tr. of R. pp. 143, 200-201; Ex. T; Ex. "A" of Ex. 1.]

Petitioner filed income tax returns for 1944, 1945, 1948 and 1949 on March 15, 1945, March 15, 1946, March 15, 1949, and May 15, 1950, respectively. Petitioner or his duly authorized representative filed consents extending the five-year statute of limitations for 1944 and 1945 to June 30, 1954, and extending the three-year statute of limitations for 1949 to June 30, 1954. The notice of deficiency for 1944, 1945, 1948 and 1949 was mailed on September 11, 1953. [Stip., pars. 1 and 2; Consents attached to Exs. D, E and I; Ex. W; Ex. A of Petition in Docket 51417.]

After a plea of *nolo contendere,* petitioner was convicted by the District Court, Southern District of California, Central Division, on two counts for violation of Section 145(b), Internal Revenue Code of 1939, such counts representing the years 1947 and 1948. [Ex. AA.]

All property that was carried in the names of nominees is included in Exhibit 1, petitioner's net worth statement. [Tr. of R. p. 169; Ex. 1.] Petitioner's accountant in preparing Exhibit 1 made an exhaustive search, checked all possible investments and received the help of petitioner in doing so. Internal Revenue Service accepted the reports prepared by petitioner's accountant in preparing the net worth statement, and did not discover any additional investments. [Tr. of R. pp. 257-258, 264-267.]

Exhibit 2, being the computation of tax based on petitioner's net worth statement, takes into account the restoration of $4,800.00 yearly alimony for the last four years. [Tr. of R. p. 318.]

The method employed by Mr. Hill in preparing the Hill Report, and the method used by Revenue Agent Ness in checking the Hill Report (Analysis of patients' Record Cards) assumed that a wavy line under a figure on the patient's record card indicated payment; and that the words "paid in full" indicated the total amount was collected, without checking to see whether the money had actually been collected; and that the word "paid" stamped on a card indicated the money had been collected, even though an amount and a date were not shown; when as a matter of fact in some cases the wavy line meant the payment had been made, and in other cases meant that it had been written off, and that it was impossible to determine by looking at the card whether the wavy line

meant the money had been collected or had been written off; and that the word "credit" written on the card did not necessarily mean that the money had been collected; and there were occasions when the card was marked "paid" when it meant it had been written off or had been uncollectible, and stamped to get it out of the file; and that the wavy line in some instances meant it had been cancelled to that date, as the patient was not able to pay; and that it could not always be determined the year in which the payments were made, because of inadequate records; and there were occasions where a card indicated that the patient had paid the amount shown on the card, when in fact the patient admitted that the amount had not been paid and was still owing. [Tr. of R. pp. 399-419, 429-430, 461-467, 472-475.]

The Hill Report does not consider the report of payments made to other doctors by the petitioner in connection with patients who had been referred by the other doctors. [Tr. of R. pp. 419-422.]

The Hill Report shows one of the greatest amount of gross receipts for 1944, notwithstanding the fact that the petitioner did not practice for four months during that year. [Tr. of R. p. 433; Ex. V.]

The petitioner declared that the card records were incorrect. [Tr. of R. pp. 429-430.]

Revenue Agent Ness made a thorough search for other assets, but did not find any not listed in petitioner's net worth statement. [Ex. 1; Tr. of Rec. pp. 425-426.]

Prior to coming to California, judgments were obtained against petitioner in Florida and there were lawsuits against the petitioner. [Tr. of R. p. 140.]

Petitioner practiced medicine in Florida, operated a hospital and practiced in Montana, and commenced practicing medicine in California in 1936. [Tr. of R. pp. 141-143.]

The petitioner was very busily engaged in practicing medicine, and worked long hours. [Tr. of R. pp. 150-151.]

When petitioner purchased a home in California in 1936 it was taken in the cousin's name because petitioner was always being sued and he did not dare have anything in his name. [Tr. of R. pp. 159-161.]

Property was placed in the names of nominees for the purpose of convenience in handling, because of difficulties petitioner was having with his wife, because of lawsuits and judgments against petitioner. [Tr. of R. pp. 186-188, 204, 218-219, 221, 296-297, 308, 433.]

Mr. Lippman cashed checks totalling $65,000.00 for petitioner, as petitioner did not want it to be traced to him because of his involvement in lawsuits. [Tr. of R. p. 237.]

Federal District Judge Leon Yankwich in passing sentence on petitioner after his plea of *nolo contendere* to two counts of violating Section 145(b), Internal Revenue Code of 1939, representing the years 1947 and 1948, found that petitioner was a person who became involved because of his lack of experience in financial matters and his failure to surround himself with persons who, while petitioner was carrying on his work, would watch his finances and see that a proper report was made; and that in this particular case there is no such thing of a physician becoming involved in income tax difficulties because of resorting to unethical practices. [Ex. 4.]

The petitioner, Richard Douglas Furnish, contends that in the absence of a showing of fraud, the deficiencies in income tax (subject to minor adjustments pertaining to two automobiles and Thomas Steel dividends) are as follows:

Year	Tax	Deficiency
1944	Income	$ 3,526.66
1945	Income	18,812.00
1948	Income	27,808.85
1949	Income	5,577.02
	Total	$55,724.53

[Stip. of Facts, Item 2.]

If the respondent has successfully sustained the burden of proof of establishing fraud, the petitioner, Richard Douglas Furnish, contends that the deficiencies in income tax and penalty (subject to minor adjustments pertaining to two automobiles and Thomas Steel dividends) are as follows:

Year	Tax	Deficiency	50% Penalty
1939	Income	$ 3,378.85	$ 1,689.43
1940	Income	17,641.28	8,820.64
1941	Income	22,285.78	11,142.89
1942	Income	27,901.73	13,950.87
1943	Income and Victory	10,210.87	5,105.44
1944	Income	3,526.66	1,763.33
1945	Income	18,812.00	11,487.81
1946	Income	18,009.54	9,004.77
1947	Income	41,467.93	20,733.97
1948	Income	27,808.85	13,904.43
1949	Income	5,577.02	2,788.51
	Totals	$196,620.51	$100,392.09

[Ex. 2.]

Specification of Errors.

1. The Court erred in using the Hill Audit [Ex. V] for the purpose of determining the correct amount of taxable income, instead of petitioner's net worth statement. [Ex. 1.]

2. The Court erred in holding that the respondent sustained its burden of proof of establishing fraud.

3. The Court erred in holding that the deficiencies were not barred by the Statute of Limitations with the exceptions of the years 1944, 1945, 1948 and 1949.

4. The Court erred in receiving in evidence the Hill Audit. [Ex. V.]

Questions Presented by Appellant.

1. Is the correct amount of taxable income provided for more accurately by petitioner's net worth statement [Ex. 1] than the Hill Audit [Ex. V]?

2. Did the respondent sustain its burden of proof of establishing fraud?

3. In the absence of fraud, are all deficiencies barred by the Statute of Limitations excepting the years 1944, 1945, 1948 and 1949?

4. Did the Court err in receiving in evidence the Hill Audit [Ex. V]?

ARGUMENT.

I.

The Correct Amount of Taxable Income Is Provided More Accurately by Petitioner's Net Worth Statement.

The determination of taxable income is more accurately reflected by the net worth statement [Ex. 1] and the computation of tax [Ex. 2] than the Hill Audit [Ex. V] relied on by respondent.

It should be noted that all items of property carried in the names of nominees are included in the net worth statement so that the net worth statement reflects all of the assets of the petitioner with the exception of certain minor adjustments pertaining to two automobiles and dividends from Thomas Steel Corporation. [Tr. of R. pp. 169-172, 206, 216.]

The auditor who prepared the net worth statement succinctly points out the logic of relying on the net worth statement when he states that the Doctor had to have money in order to spend it. [Tr. of R. pp. 243-245.] It is not reasonable to assume that the petitioner acquired all of the money in any one year immediately prior to its expenditure. For example, the real property and improvements increased from approximately $14,000.00 at the end of 1943 to approximately $81,500.00 at the end of 1944, a difference of $67,500.00. During that same year his schedule of investments increased from approximately $34,000.00 to $61,000.00, a difference of $27,000.00, making a total increase of $94,500.00. It would not appear to be reasonable to assume that the $94,500.00 was all acquired during the previous year,

but it is more logical to believe that it is the result of an acquisition of cash over a number of years.

It should be noted that the investment schedule increased from the end of 1942 from approximately $7,500.00 to $34,000.00 at the end of 1943, or an increase of $26,500.00. The same reasoning applies.

The schedule of real property and investments increased from approximately $81,500.00 at the end of 1945 to approximately $192,000.00 at the end of 1946, or an increase of $110,500.00. Surely the respondent does not argue that there was an increase in the acquisition of cash of $110,500.00 for the previous year so as to be able to acquire the real property indicated.

An inspection of the summary of assets contained in the net worth statement indicates it is far more logical to assume the petitioner had acquired cash over a period of years in order to acquire the assets shown in the various schedules than to believe the cash was obtained within the year immediately preceding the acquisition of the specific items.

There does not appear to be a valid reason for doubting the petitioner's report of cash on hand, in view of the proof of expenditures by the petitioner. [Tr. of R. p. 249.]

The reports submitted by the petitioner's accountant when preparing the net worth statement were accepted by the respondent. [Tr. of R. pp. 258, 264.] An exhaustive search was conducted by the accountant, even to the point of getting information concerning government bonds and checking with agents of the government. [Tr. of R. p. 265.] All possible investments were checked. The accountant had the assistance of the petitioner, who told the accountant of certain items which

would not have been known except for the information given by the petitioner. The Internal Revenue Service did not discover any investments in addition to those reported in the net worth statement. [Tr. of R. p. 266.]

No objections were made by the respondent pertaining to schedules submitted by petitioner's accountant in the net worth statement. [Tr. of R. pp. 258, 264, 275-276, 279, 281-284, 287-288.] Needless to say, the Internal Revenue Service through its various agencies conducted a most intensive investigation into the affairs of the petitioner. There was a criminal case in addition to the civil action. The full facilities of the Federal Government were available to the respondent, and judging from the work that was done by the respondent in this case, it is only natural to assume that if there were any additional assets belonging to the petitioner, the respondent would have located at least one. Internal Revenue Agent Ness testified that a diligent effort was made to find any other possible assets, and none was found. [Tr. of R. pp. 425-426.] Therefore, we have every right to believe that in the absence of any such discovery, the petitioner's net worth statement, other than minor adjustments, is an accurate accounting of the assets of the petitioner as they were acquired over the years in question.

Usually the respondent prepares a net worth statement and relies on it for the purpose of establishing the income tax liability of a taxpayer. It is significant that the same method was used by the petitioner's accountant in preparing the net worth statement as is customarily employed by the Internal Revenue Service when it prepares a net worth statement on which it intends to rely. [Tr. of R. pp. 426-427.]

To rely on the method used by the respondent to determine the taxable income of the petitioner would be resorting to conjecture and surmise of the worst order. It is clear from the testimony of witnesses who were familiar with the records of the petitioner that one could not determine from an inspection of the record whether an item was paid or whether the patient was merely given a credit without any payment having been made.

Sometimes a wavy line indicated that the amount had been paid; sometimes it indicated that the patient was given a credit; sometimes the word "paid" meant the item was collected; sometimes it meant the account was merely closed out or written off; on occasions, cards of patients had a notation that the account was paid when in reality the patient came in and stated that there was money still owing to the petitioner; there were instances when a patient was not financially able to pay, and a wavy line was drawn to indicate not to send any more statements; the word "paid" could mean it had been written off or had been uncollectible and stamped to get it out of the file. [Tr. of R. pp. 461-466, 472-474, 400-419.]

Agent Ness in making his spot check of the Hill Report used the same method of determining payments as was used by Mr. Hill. It therefore follows that his spot check was of no significance because he engaged in the same surmises and conjectures as Mr. Hill did. He assumed that every wavy line meant the items had been collected; he assumed that every time the word "paid" appeared it meant the patient had paid the bill; he assumed that all items were collected whenever the same type of entry was made as was made when the obligation actually had in fact been collected; whereas the truth of

the situation is that many patients were unable to pay and the employees of the petitioner did not keep accurate records of the accounts between the petitioner and his patients.

Another fallacy of the Hill Report is that for the year 1944 it shows one of the largest collections of the years in question, when as a matter of fact the petitioner did not even practice medicine for four months during that year. [Tr. of R. p. 433.] As the petitioner stated to Revenue Agent Ness, it was not humanly possible for one man with the class of patients the petitioner had to do as much business as the Hill Report showed. [Tr. of R. p. 429.]

Petitioner agrees to adjustments of $500 for 1941 and $900 for 1944 because of gifts of two automobiles, and that a further adjustment should be made of $2,592.00 of Thomas Steel dividends received and retained by Mrs. Sullivan during the year 1948. These are adjustments that can be considered on a redetermination of tax when the decision of the Court is rendered.

II.

Respondent Has Not Sustained Burden of Proof of Establishing Fraud.

Title 26, Section 7454 of the *United States Code* provides that in any proceeding involving the issue of whether a petitioner has been guilty of fraud with intent to evade tax that the burden of proof in respect to such issue is upon the respondent.

In the case of *Wisely v. C. I. R.,* 185 F. 2d 263 (C. C. A. 6th, 1950), the Court held that the finding of the Commissioner of Internal Revenue that the taxpayer, a physician who was assessed with penalties, was guilty

of filing false and fraudulent income tax returns was clearly erroneous. In the *Wisely* case the taxpayer, who was a physician, was personally busy to the point of distraction and the Court held that it was vitally material. The Court's opinion states that fraud must be an actual intentional wrongdoing and that the intent required is a specific purpose to evade tax believed to be owing. The Court further held that mere neglect does not establish either, and that fraud must be established by clear and convincing proof. In the *Wisely* case a receptionist and a technician did the banking for the physician. Enough money was kept on deposit in the bank to pay expenses. The physician would occasionally take money from a safe and put it into a bank safety deposit box from which he would make withdrawals. Notwithstanding these facts, the Circuit Court reversed the Tax Court on the question of fraud.

The Tax Court, in the case of *D. York v. C. I. R.*, 24 T. C. 742 (1955), held that unexplained bank deposits are not in themselves clear and convincing evidence that the income tax return was false and fraudulent with intent to evade taxes. In the *York* case the taxpayer had reported wages of $2,950.00 and kept no books. There was an understatement of income which was shown by various bank transactions amounting to a net of $6,100.00. The Tax Court ruled that the petitioner must have had funds in order to make an investment in the liquor business before he had a bank account, and that the failure of the petitioner to explain the deposits did not make up the deficiency in the Commissioner's evidence to sustain the burden of proof of fraud.

Fraud implies bad faith, intentional wrongdoing and a sinister motive and is never imputed or presumed and a

Court should not sustain findings of fraud on circumstances which at most create only suspicion.

Davis v. C. I. R., 184 F. 2d 86 (C. C. A. 10th, 1950), 22 A. L. R. 2d 967.

"Fraud," authorizing imposition of penalties against taxpayer who attempts to avoid tax liability, is actual intentional wrongdoing, and intent required is a specific purpose to evade tax believed to be owed.

Guaranty Trust Co. v. United States (D. C. Wash., 1942), 44 Fed. Supp. 417, aff'd 139 F. 2d 69.

While determinations of the Commissioner are presumptively correct and the burden is on taxpayer to disprove them, burden is upon Commissioner to show fraud, and such burden is not sustained by merely establishing a deficiency.

Cohen v. C. I. R. (C. A. 10, 1949), 176 F. 2d 394.

Where tax case involved issue of whether return was fraudulent, there is no presumption to be indulged in favor of Commissioner's determination, and burden to establish charge of fraud is upon him.

Goldberg v. C. I. R. (C. C. A. 1938), 100 F. 2d 601, cert. den. 59 S. Ct. 793; 307 U. S. 622; 83 L. Ed. 1501.

Where income tax deficiencies had not been timely assessed and, but for proof of fraud, all such deficiencies except that for last year in controversy would have been barred, Commissioner of Internal Revenue had burden of proving, by clear and convincing evidence, that decedent had filed false and fraudulent returns.

Lee v. C. I. R. (C. A. Ga., 1955), 227 F. 2d 181, cert. den. 76 S. Ct. 1048, 351 U. S. 982.

When we consider the petitioner's background and the reasons which prompted him to place assets in the names of nominees, it can be readily seen that the respondent has not sustained the burden of proof which the statute and the decisions of the Courts require.

This is clearly the case of a doctor who thought more of practicing medicine than anything else; he was busy morning, noon and night looking after his patients. [Tr. of R., pp. 150-151, 298.] He was plagued with judgments obtained in Florida, lawsuits and difficulties with his wife extending over a period of years which culminated in an interlocutory decree of divorce on December 11, 1944.

He was so preoccupied with the practice of medicine that he allowed his business manager to handle the bank accounts and to take property in his name. There is nothing unusual about this. The bank accounts showed in the name of the business manager in his capacity as business manager or as trustee, and the address given was the office address of the petitioner. It is common practice for physicians and surgeons to allow their business managers to handle their bank accounts and financial matters. Properties taken in the name of the business manager included the petitioner's office building and an apartment house which the petitioner had in mind converting into a hospital. The petitioner did not wish to be bothered with the details of the escrows in either purchasing or selling, and therefore permitted his business manager to take title.

It is significant that in every instance where a nominee was used it was done because of judgments, lawsuits, or marital difficulties, or for the sake of convenience. [Tr.

of R., pp. 140-141, 159-160, 184, 186-188, 204, 218-219, 221, 237, 297, 308.]

The pattern of taking property in the name of a nominee was demonstrated as early as 1936, which is the first year the petitioner practiced medicine in California and years before the respondent contends there was any deficiency in income taxes. It will be recalled that the home the petitioner purchased in 1936 was taken in name of his cousin. [Tr. of R., pp. 159-160.]

It is common knowledge the layman is under the impression there is 25% income tax on long-term capital gains. People have become "capital gain" conscious because they have heard it is advantageous to make a capital gain rather than receive straight income as "you only have to pay 25% of the capital gain if the asset is held more than six months."

Oftentimes, a little knowledge is dangerous. The Court recognizes that the "25% tax" does not necessarily apply. The rate of tax paid by a taxpayer as a result of capital gains depends on his deductions and total taxable income. Therefore, it should not be held against the petitioner that he believed the full tax on a capital gain was paid when the nominee reported the sale of property and paid the tax. It is true the petitioner was wrong in assuming the full tax was paid. But petitioner's error in judgment does not sustain respondent's burden of proof to show fraud. It is respectfully suggested that there is a very small percentage of people who know or understand that the full tax is not necessarily paid by reporting a capital gain and paying the "25% tax". In the instances where sales were made in the names of nominees the presumed capital gain tax was paid. Neither the petitioner

nor the nominees thought otherwise until the investigation by the Internal Revenue Service was launched.

By the same token, the failure to include the Thomas Steel stock dividends of 1948 in the petitioner's income tax return is not a showing of fraud. Here again it is natural to assume and believe a taxpayer honestly thought that the person who actually received the income is the one required to pay the tax. In this case Mrs. Douglas received the dividends on the stock, kept the dividends, and used the dividends, even though she was the nominee of the petitioner insofar as the ownership of the stock is concerned. Mrs. Douglas paid the tax on the dividends and there was no intent to defraud the government. [Tr. of R., p. 220.]

The witness relied on by the respondent to furnish the damning or incriminating evidence to show fraud on the part of the petitioner was Herman Duelke. It was Duelke who would have this Court believe the petitioner stated he had removed records, was not worried about an investigation by the Internal Revenue Department, and that the Internal Revenue Department had previously invesitgated him. However, Duelke's credibility collapses when we consider the testimony of Edward Anspach, a disinterested witness.

It will be recalled that Mr. Anspach testified Duelke attempted to sell the Hinton Arms Apartment house under a power of attorney Duelke held. An agreement was executed by Duelke for the sale of the apartment house at a minimum figure of $65,000.00, when Mr. Anspach had a customer ready to buy the place for approximately $115,000.00. When the petitioner heard of it, he was disturbed and said he would not sell, although he offered to pay Mr. Anspach for any loss of commission he might

have sustained. The next week Mr. Anspach learned that Mr. Duelke was no longer with the petitioner. [Tr. of R., pp. 388-392.] But Mr. Duelke denies Mr. Anspach's testimony *in toto*. Duelke's testimony was so palpably false that he carried it to the extreme of saying he told Mr. Anspach the petitioner was the owner of the Hinton Arms Apartments because the question came up as to whether the petitioner owned the property. The Court was prompted to ask: "Why would that question have been relevant?" To which the witness replied: "I don't know." [Tr. of R., pp. 451-456.]

The petitioner may have hidden assets because he was afraid of creditors and holders of judgments. He may have been interested in not wanting his wife to know how much property he owned. He may have misunderstood the effect of the "25% capital gains tax"; he may not have known of his obligation to pay an income tax on dividends received and retained by a nominee; he may have been secretive; his office staff may have kept a poor bookkeeping system; but the evidence falls short of sustaining the burden of proof required of the respondent to show that the petitioner was guilty of actual intentional wrongdoing with the specific intent to evade federal income taxes.

The testimony of Duelke regarding his conversation with the petitioner about a previous income tax investigation falls of its own weight when we consider that Duelke was employed by the petitioner from November, 1945 to May, 1947, and the two income tax investigations were one in 1948, which was after Duelke no longer worked for the petitioner, and the other investigation was in 1945 covering two previous years for which no increase in income tax liability resulted, and was a mere audit.

Counsel for petitioner is fully aware of the case of *Mitchell v. C. I. R.,* 303 U. S. 391, wherein the Court held that an acquittal of income tax violation does not prevent the imposition of the 50% fraud penalty.

Petitioner contends, however, that the statement by Federal District Judge Leon Yankwich constitutes an express finding that there was no fraud on the part of petitioner, and in particular for the years 1947 and 1948, which were the two years involved in the criminal prosecution, and to which charges he entered a plea of *nolo contendere.* Judge Yankwich stated:

> "This case is different from the usual one involving a physician. Many a time a physician involved in income tax difficulties is one who resorts to unethical practices, and who then tries to cover them up by covering up his income tax. In this particular case there is no such thing. There is no income indicated from any improper sources. This is really the case of a person who has become involved because of his lack of experience in financial matters and his failure to surround himself with persons who, while he is carrying on his work, would watch his finances and see that proper report is made. . . ." [Ex. 4.]

Accordingly, it is respectfully urged that the respondent has not sustained the burden of proof to establish the required fraudulent intent on the part of the petitioner.

In this connection it should be noted that Mrs. Funk, the co-petitioner, is involved in these proceedings by virtue of the respondent's contention that there were joint tax returns filed for the years 1939 to 1942 inclusive, and that a finding of fraud as to the petitioner, Richard Douglas Furnish, would cause the petitioner, Emilie Funk, also to be held responsible for those years. If fraud is

not established for the years 1939 to 1942 inclusive, the respondent's case against the co-petitioner, Emilie Funk, falls, as the deficiencies would be outlawed by the Statute of Limitations. [Stip. of Facts, Item 2.]

III.

In the Absence of Fraud All Deficiencies Are Barred by the Statute of Limitations, Excepting the Years 1944, 1945, 1948 and 1949.

Consents extending the statute of limitations were timely filed for the years 1944, 1945, 1948 and 1949. The record does not disclose any extension for the other years involved. [Stip., pars. 1 and 2; Consents attached to Exs. D, E, and I; Ex. W; Ex. A of Petition in Docket 51417.]

Therefore unless fraud is established, the only years for which a deficiency may be upheld are 1944, 1945, 1948 and 1949. Under petitioner's net worth statement (subject to adjustments for two automobiles and Thomas Steel dividends) the deficiency would be $55,724.53. [Stip., Item 2.]

Under the respondent's theory of the Hill Audit, the deficiency for the four years would be $147,114.76. [Tr. of R., p. 113.]

IV.

The Hill Audit [Ex. V] Should Not Have Been Admitted in Evidence.

Objections were made to the introduction of the Hill Audit [Ex. V] on the grounds that the proper foundation was not laid to establish its accuracy, or the manner in which the report was compiled. [Tr. of R., p. 366.] The objections were overruled and the exhibit was received in evidence. [Tr. of R., p. 367.]

It is significant that neither Mr. Hill who prepared the report nor anyone who may have assisted him in compiling the report was called as a witness.

To rely on the Hill report as a means of determining the tax liability of the petitioner, is to depend on conjecture and surmise of the worst order. It is clear that one could not determine from an inspection of the patient's record card, whether an item was paid or whether a patient was merely given credit without a payment having been made. Yet it is the patient's record card that was used as the basis for the Hill report. [Tr. of R., pp. 461-466, 472-474, 400-419.]

Proof of the fallacy of the Hill report is that the year 1944 shows one of the largest collections, when as a matter of fact, the petitioner did not practice medicine for four months during that year. [Tr. of R., p. 433.] The unreliability of the Hill report is set forth more particularly in the Argument of Point I of this Opening Brief.

Conclusion.

It is respectfully urged that the net worth statement should be used as the basis for determining the tax deficiency. If that is done, then in the absence of fraud (subject to adjustments for two automobiles and Thomas Steel dividends) the deficiency should be $55,724.53 for the four years not barred by the statute of limitations. [Stip., Item 2; Ex. 2.]

In the event the Court determines that fraud was established, then the deficiency, subject to the same adjustments, should be $196,620.51 with a penalty of $100,392.09. [Ex. 2.]

Murray M. Chotiner,

Attorney for Petitioner, Richard Douglas Furnish.

APPENDIX.

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No. 15942

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

(Richard Douglas Furnish) and
Emilie Furnish Funk,

Appellant,

vs.

Commissioner of Internal Revenue,

Appellee.

APPELLANT, EMILIE FURNISH FUNK'S OPENING BRIEF.

FILED

JUL 14 1958

PAUL P. O'BRIEN, CLERK

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I.

The court should have determined that negligence, even gross negligence in signing of blank returns, does not constitute fraud, particularly when it was not shown, and was conceded that appellant had no knowledge nor received benefit, direct or indirect, from fraudulent actions of former spouse, and was in fact a victim of said conduct.. 4

TABLE OF AUTHORITIES CITED

Cases

Aylesworth, Merlin, Estate of (1955), 24 T.C. 134

Carraro, Joseph, 29 B.T.A. 646

Cole v. Comm., 81 F. 2d 485

Connor v. Grasso, 41 Cal. 2d 299

Dunn, Ethel B., v. Comm., 3 T.C. 319

Emerzian, Zabelle (1953), 20 T.C. 825

Goldman v. House, 93 Cal. App. 2d 572

Harrold v. Harrold, 127 Cal. App. 2d 582

Hecht, Sam D. (1951), 16 T. C. 981, 987

Hickey, Ethel S., T.C. Memo. (1955) 149

Howell, Myrna S. (1948), 10 T.C. 859

Jolly, Estate of, 196 Cal. 547

Kane, John, v. Comm., 11 T.C. 74

Kemp v. Emermark, 194 Cal. 748

Knowles, Edwin F., 40 B.T.A. 861

Lane, Joyce Primrose, 26 T.C. 549

McCord v. Grainger, 201 F. 2d 103

O'Bryon v. Comm., 148 F. 2d 456

Shinn v. MacPherson, 58 Cal. 596

Spies v. United States (1943), 317 U. S. 492, 30 A.F.T.R. 378

Stegeman v. Vandevender, 57 Cal. App. 2d 753

Thorpe, Spencer, v. Comm. (1940), 42 B.T.A. 654

Tinsley v. Bauer, 125 Cal. App. 2d 724

United States v. Malcolm, 2 U.S.T.C. 650

Young, John, March 19, 1952 Memo., Docket 27611

No. 15942

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EMILIE FURNISH FUNK,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPELLANT, EMILIE FURNISH FUNK'S OPENING BRIEF.

Statement of the Pleadings.

The former husband of petitioner, Richard D. Furnish, was indicted for tax evasion and fined on *Nolo Contendere* plea. Deficiencies were asserted against Richard Furnish covering years 1939 to 1949, inclusive, of $307,717.51, plus fraud penalties of $155,945.57. Appellant Emilie Furnish Funk was held jointly and severally liable by Tax Court for years of 1939 to 1942, inclusive, on basis of joint returns signed by her for part of said deficiencies in total sum of $35,284.58, plus fraud penalties of $17,-647.29.

An additional assessment was made against Appellant Emilie Furnish Funk for year of 1943, in which a sepa-

rate return was filed by her, for sum of $25,063.13, plus fraud penalties of $12,531.56. This was dismissed at time of trial by stipulation because Respondent-Appellee conceded that there was no fraud or fraudulent intent on part of Emilie Furnish Funk.

Trial of issue in Tax Court as Los Angeles, California, within appeal jurisdiction of United States Ninth Circuit Court of Appeals, and judgment in accordance with above provisions rendered on November 20, 1957. Appeal filed by both individual appellants, who are adverse to each other, for review and reversal of Tax Court's decision, pursuant to pertinent Federal Rules of Procedure.

Statement of the Facts.

The opinion of the Tax Court is conceded by this appellant to be a very concise, true and accurate picture of the facts in these cases.

Appellant Emilie was married to appellant Richard for 21 years and had four (4) children. In 1943 a divorce was obtained by Emilie, and Richard received all community property with exception of Pontiac automobile. Richard paid Emilie $50,000.00 over four year period for what was described as true value of all community property at time of divorce. This figure was consistent with, and was then thought by her to be the true appraised value and in accordance with his reported earning power. Nine years later, appellant Emilie was served with notice of said deficiencies arising from former husband's fraudulent activities. She demur*r*ed and filed in Tax Court.

The Government conceded that she was an innocent victim and had been deliberately defrauded along with the Government, and that she had no knowledge or participated in said fraud. Furthermore, at trial, the community property was of proven value of over $50,000.00 at time of her separation. On the basis of her non-participation, lack of knowledge and non-receipt of benefit, the Government conceded that the Statute of Limitations would bar any liability of her separate return for year of 1943, but held that her signing of joint returns in blank, made her jointly and severally liable for years of 1939 to 1942, inclusive, for not only income reported but income not reported, plus fraud penalties. The Tax Court recognized the harshness and unfairness of this decision, but stated that it lacked equity jurisdiction to alleviate it. The opinion on pages 2, 3, 7, 23, 24 and 35 of said opinion recognized the fact that an innocent party is being held liable for fraudulent activities of former spouse, when in fact said innocent party had no knowledge of, had not concurred in, nor received benefit, either direct or indirect, from said fraud. Beyond that, this appellant Emilie Furnish Funk has no contest as the trial and decision were eminently fair. This appellant's only contention was that Tax Court failed to distinguish between Fraud and Negligence, when said negligence does not result in benefit.

Specification of Error.

The only error of which appellant Emilie Furnish Funk complains is that she is being held jointly and severally liable on the basis of fraud, when, in fact, it is admitted

that she was innocent and was herself a victim of the same fraud as the Government. Facts have proven that she had no knowledge of said fraud nor the extent of the community property and has never received any benefit, directly or indirectly, from the funds concealed by Richard Furnish. She concedes that through years of harsh and cruel treatment she had been subjugated to her husband's commands and so had signed returns in blank. She further concedes that this negligence could make her liable on all income reported on each return she signed in blank. There is no issue there, it is all paid.

However, when there is no fraud shown on the part of an individual, even though said individual signed a joint return, it cannot be termed or held fraud unless there be shown that this person had knowledge, concurred in or received some benefit from said fraud. The cases, all pertinent ones which are cited in the index and herein referred to, have gone on the basis of the "Clean Hands Doctrine". The courts have sought to determine whether or not petitioner had or had not received benefit, even though denying knowledge. No case researched has been as strong in favor of petitioner as this present case. Even the *Aylesworth* case proved duress, but also proved benefit to wife. Therefore, though the unfairness be admitted, the assessment would bankrupt this appellant if permitted to stand. The decision actually imputes fraud because of marital relationship. A person should be liable on what they sign, or from which they benefit. But, here, an innocent and already wronged former spouse is being

held liable for something she knew not of, benefited not from, and did not condone. Her liability for her negligence should extend to only what is *on* the return, not also what is *not on* it. Shakespeare would have said—

> "Sans intent, Sans act, Sans knowledge, Sans concurrence, Sans Benefit—where be thy Fraud? Aye, Negligence—but not Fraud."

Therefore, this appellant contends that the Tax Court should have added a refinement to past cases and distinguished between negligence without benefit, and fraud, thus, alleviating the situation and hold Richard Furnish alone liable for taxes and penalties due on unreported income for years 1939 through 1942, inclusive.

This appellant, Emilie Furnish Funk, respectfully requests this Honorable Court to reverse the decision as pertains to her.

Respectfully submitted,

Dermot R. Long,

Attorney for Appellant.

No. 15942

In the United States Court of Appeals for the Ninth Circuit

RICHARD DOUGLAS FURNISH AND EMILIE FURNISH FUNK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petitions for Review of the Decisions of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

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In the United States Court of Appeals for the Ninth Circuit

No. 15942

RICHARD DOUGLAS FURNISH AND EMILIE FURNISH FUNK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petitions for Review of the Decisions of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and conclusions of law of the Tax Court (R. 76-110) are reported at 29 T.C. 279.

JURISDICTION

The petitions for review involve federal income taxes for the taxable years 1939 through 1949. On September 11, 1953, the Commissioner mailed to both taxpayers a notice of deficiency for 1939 through 1942, joint tax years. (R. 20-27.) On September 11, 1953, the Commissioner mailed to the taxpayer Richard Douglas Furnish a notice of deficiency for

1943 through 1949, his separate tax years. (R. 37-51.) Within ninety days thereafter and on December 4, 1953, taxpayer Emilie Furnish Funk filed a petition with the Tax Court for a redetermination of the deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954 for the years 1939-1942. (R. 3-14.) On December 7, 1953, (R. 27, 51), taxpayer Richard Douglas Furnish filed similar petitions, one for the joint years, 1939-1942, (R. 15-20), the other for the separate years, 1943-1949 (R. 28-36). The three petitions were consolidated and tried together. (R. 128.) The decisions of the Tax Court were entered on November 21, 1957. (R. 111-113.) The case is brought to this Court by petitions for review filed by each taxpayer February 17, 1958. (R. 114-118.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court erred in holding that the amount of the deficiency for each of the taxable years 1939 through 1949 was correctly determined by the Commissioner.

2. Whether the Tax Court correctly found that the taxpayer had filed a false and fraudulent return with intent to evade taxes for each of the years 1939 through 1948 so that taxpayer was subject to the tax provided by Section 293(b) of the 1939 Code.

3. Whether the assessment and collection of deficiencies for any of the taxable years is barred by the statute of limitations.

4. Whether the returns filed for the years 1939 through 1942 were joint returns of the taxpayers husband and wife, or the separate return of the husband.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1952 ed., Sec. 41.)

SEC. 51. INDIVIDUAL RETURNS.

* * * *

(b) *Husband and Wife.*—In the case of a husband and wife living together the income of each (even though one has no gross income) may be included in a single return made by them jointly, in which case the tax shall be computed on the aggregate income, and the liability with respect to the tax shall be joint and several. No joint

return may be made if either the husband or wife is a nonresident alien.

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(26 U.S.C. 1952 ed., Sec. 51.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

*　　*　　*　　*

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612(d)(2).

(26 U.S.C. 1952 ed., Sec. 293.)

STATEMENT

The facts as found by the Tax Court (R. 76-98) can be summarized as follows:

Taxpayer Richard Douglas Furnish (hereafter referred to as taxpayer) resides in Hollywood, California. During the years involved he was a doctor of medicine and practiced in Los Angeles, California. Taxpayer Emilie Furnish Funk (hereafter referred to as Mrs. Funk) resides in Arcadia, California; she is the former wife of Furnish. (R. 79.)

Taxpayers were married in 1923 at Omaha, Nebraska, while Furnish was a medical student. Four children were born of the marriage. He interned in Florida in 1925 and practiced medicine there until 1931, filed no returns for 1925, 1926, 1927, 1930, or 1931, and he filed returns for 1928 and 1929 showing

no tax due. In 1931 one of his automobiles was repossessed. He and his family then moved to Scobey, Montana, where he practiced for approximately two years. (R. 79-80.)

In 1933, taxpayers moved to Los Angeles. During the following two years, taxpayer traveled extensively around the country, engaging in the business of promoting and selling a serum for the injection treatment of hernia, imported from Spain, and two other products, one from Canada and one from Japan. He was away from his family except at Christmas. During this period his wife supported herself and the children in Los Angeles selling medicine which she bought out of a small inheritance from her father. She lived in inexpensive quarters that were furnished with secondhand furniture. She was unable to keep up the payments on this furniture, which was repossessed. Taxpayer then joined his family in Los Angeles and they moved to a furnished 2-bedroom apartment which was rented for $35 a month. They lived in that apartment for several years, until taxpayer purchased a house at 121 Highland Avenue. He had to borrow $1,000 in order to make the down payment. Title was taken in the name of his cousin. (R. 80.)

Taxpayer began to practice medicine in Los Angeles in 1936. Since he was not a member of the Los Angeles County Medical Association, he had difficulty in obtaining hospital facilities for his patients. In 1942 and 1943 he finally acquired interests in two hospitals. He devoted long hours to the practice of medicine in Los Angeles. (R. 81.)

Mrs. Furnish was granted an interlocutory decree of divorce from taxpayer in 1944. For the years 1943-1949, inclusive, he filed individual income tax returns. For each of the years 1939-1942, inclusive, a return was filed that was signed by both the taxpayers. The returns for 1939 and 1940 had been destroyed and were not available at the time of trial. The 1941 and 1942 returns were presented in evidence. The signatures of both taxpayers appear at the bottom right hand corner of the first page of these two returns immediately over the following printed instruction: "If this is a joint return (not made by agent), it must be signed by both husband and wife." However, in the caption at the top of the first page of these returns there appears only the name "Richard Douglas Furnish" over the printed instructions to the following effect: "(Use given names of both husband and wife, if this is a joint return)." Mrs. Furnish is not listed as a dependent on these returns and exemptions were claimed in the 1941 and 1942 returns in the amounts of $1,500 and $1,200, respectively, the maximum amounts that were allowable to both husband and wife for those years. She filed no separate returns for the years 1939-1942, inclusive, and had no separate income during such years. (R. 81-82.)

The return for each of the years 1939-1942 was signed in blank by Mrs. Furnish at her husband's request, and he thereafter filled it out. She did not know of the contents of the return, nor was she aware of the fact that her husband had received unreported income. They were living together as husband and wife during this period. In connection with the

divorce proceedings taxpayers entered into a property settlement agreement on October 27, 1944, in which the husband agreed to pay the wife $10,000 at once plus an additional $40,000 at the rate of $400 a month. He also transferred to her his interest in a Pontiac automobile and certain household objects. He concealed from her the full extent of his assets. (R. 82.)

Taxpayer was secretive in his financial transactions, and followed the practice of taking title to property in the names of nominees. Among the reasons for such secretivenes was the state of his relationship to his wife and his fear of lawsuits. (R. 82.)

During the taxable years, taxpayer purchased five pieces of real property in Los Angeles; in each case, title to the property was taken in the name of another, his business agent Duelke, his aunt R. M. Scanlon, one Ramseyer, his former nurse, Elodia Sullivan and a cousin, C. T. Scanlon. Taxpayer furnished the funds, in cash, in one case, $25,000 in bills of small denominations. Two of the properties (401 North Vermont and Florence Avenue and Crenshaw Boulevard) were sold through others and arrangements made for taxpayer to receive the proceeds in cash from the nominal sellers. Taxpayer said that he did not want the checks traced to him because he was allegedly involved in some lawsuits. (R. 82-88.) The gains from the sale of the properties were reported by the nominal title holders. (R. 88.)

By the use of nominees to report the gains derived from the sales of the 401 North Vermont and the Florence and Crenshaw properties, petitioner evaded substantial amounts of income tax. ·The amount of

taxes paid by such nominees with respect to those gains was substantially less than the amount of taxes that petitioner would have had to pay, had he included those gains in his returns. (R. 88.)

Taxpayer also caused nominees to purchase shares of stock (Thomas Steel Company and Parkview Hospital (R. 84-85, 88)) for him, and he failed to report the dividends as income. (R. 88; see also R. 100, 240.)

Taxpayer followed the practice of sending patients' checks to his sister in Kansas City where she cashed the checks and accumulated the currency for him. Sometime prior to 1946 the accumulated currency, amounting to approximately $25,000, was transmitted to him by express. He continued the practice of sending patients' checks to his sister to be converted into currency, and in the latter part of 1947 his sister personally transmitted an additional $25,000 in accumulated currency to him. (R. 88-89).

Taxpayer consistently followed the practice of carrying his bank accounts in the names of employees or relatives. The accounts carried in the name of Herman Duelke bore a designation after his name of either "business manager" or "trustee," without, however, identifying taxpayer as the owner of the accounts; taxpayer's business address was used as the address of Duelke. Taxpayer also maintained some small accounts in the names of relatives. (R. 89.)

At the start of the investigation of his returns by agents of the Internal Revenue Service in January 1949, taxpayer stated to a special agent of the Intelligence Division of the Internal Revenue Service that he had never bought or sold any real estate in California at any time, nor had he asked anyone else for

the use of his name in the purchase or sale of a parcel of real estate. In fact, taxpayer had engaged in numerous real estate transactions buying and selling property through nominees, and at the time of the interview owned three pieces of property held in the names of nominees. His 1946 tax return showed a sale of real property known as the Bonnie Brae Medical Building. (R. 89.)

During the same interview, when confronted with his 1946 income tax return showing income from rents from the Hinton Arms apartment house, taxpayer stated to the special agent that he did not own that building, that it was the property of his business manager, Duelke, and that he had leased it from Duelke. In fact, taxpayer was the real owner of the Hinton Arms and Duelke was merely his nominee. (R. 89-90.)

Duelke tried to install an accurate record system for taxpayer, who would not allow him to do so and inquired as to how, "with 130,000,000 people," he could be checked by the Bureau of Internal Revenue. During the year 1946 taxpayer told Duelke that he had been previously investigated by the Bureau of Internal Revenue at his office, and had removed some of his records from his office to his home. (R. 90.)

No set of books adequately reflecting income was maintained by taxpayer. In the initial stages of the investigation leading up to the present proceedings, the revenue agents attempted to determine his correct income from payments disclosed by patient history cards maintained in his office. It became apparent to the agents that not all the cards were

made available to them. When questioned concerning this, taxpayer stated to the agents that certain files were lost in moving his office. Subsequently he hired an attorney. In August 1949, at the office of the Intelligence Division, this attorney stated that it was to the interest of his client to cooperate with the Government, that there would be no longer a claim of lost files, and that they were going to have an audit made of his patient record cards to determine the amount of income he had received and would present this audit to the Government. All of the patient record cards were then made available to the investigating agents. (R. 90-91.)

Taxpayer's attorney employed a certified public accountant, Harry K. Hill, to make an audit for the purpose of determining as nearly as possible the amount of gross income received by taxpayer from his patients over the years 1939-1948, inclusive, as disclosed by the patient record cards maintained in his office. A typical patient record card contained the name of the patient, the medical history and treatment afforded the patient, and the amounts and dates of payments made by the patient. These cards were used by taxpayer's office staff as the basis of preparing bills sent out to the patients. (R. 91.)

In making his audit Hill examined all the patient record cards. Whenever he could not reasonably determine from his examination of any cards the amount paid or year of payment those cards were segregated. The segregated cards were then worked over separately with Irma Wheeler or Ruby Saunders, office employees of taxpayer. Any cards which could not

be explained by them were submitted to the taxpayer for clarification. Irma Wheeler had been employed by taxpayer since 1942 for general office work, with duties which included making entries on the patient record cards and billing patients. Ruby Saunders was employed from the latter part of 1948 until 1952 with similar duties. She installed a new system of making entries on the cards, but she had to be familiar with the old system in order to bill patients for charges incurred prior thereto. (R. 91.)

Upon the completion of the Hill audit in June 1950, it was turned over to the Internal Revenue Service by taxpayer's attorney. A special agent checked Hill's work papers with the transcript he had made from approximately 3,000 patient record cards which had been made available to him in the initial stages of the investigation. The special agent also took the work papers to taxpayer's office to make test checks against patient record cards which had not previously been made available to the Government. The special agent consulted with Irma Wheeler, Ruby Saunders, or taxpayer whenever there was an ambiguity in a particular card. Of approximately 3,900 cards checked by the special agent against the Hill audit only a few discrepancies were noted, and these were of a comparatively minor character and generally were in favor of taxpayer. (R. 92.)

In making test checks of the Hill audit against the cards previously withheld, the special agent in general made samplings based upon an arbitrary selection of certain letters of the alphabet. Thus, in transfer file No. 1 he checked 75 cards in the letters A and B,

of which there were 700, and did not check the rest of the alphabet; in transfer file No. 2 he checked 200 cards in the letter P, of which there were 1,200, and did not check the rest of the alphabet; in transfer file No. 2A he checked 150 cards in the letter E, of which there were 1,300, and did not check the rest of the alphabet; in transfer file No. 3 he checked 200 cards in the letters A and C, of which there were 600, and did not check the rest of the alphabet; in transfer file No. 4 he checked 150 cards at random, of which there were between 1,200 and 1,300; in transfer file No. 4A he checked 50 cards at random, of which there were between 900 and 1,000; in transfer file No. 5 he checked 75 cards at random, of which there were 500. (R. 92-93.)

The gross receipts derived by taxpayer from his medical practice for the years 1939-1948, as reported in his income tax returns, and the gross receipts disclosed by the patient record cards according to the Hill audit were as follows:

Year	*Gross Receipts Reported*	*Gross Receipts per Hill Audit*
1939	Return Unavailable	$17,720.88
1940	Return Unavailable	27,734.16
1941	$20,826.00	48,685.06
1942	25,642.00	66,252.56
1943	21,374.46	106,558.90
1944	26,521.50	107,230.58
1945	41,188.31	93,621.83
1946	55,493.08	141,542.82
1947	32,821.11	110,695.16
1948	57,330.03	81,892.84

The actual gross receipts from patients were not less than those shown by the Hill audit. (R. 93.)

In determining the deficiencies for the years 1941-1948, inclusive, the Commissioner included in gross income the gross receipts from patients as shown in the Hill audit, and unreported dividends, interest, and gains from the sale of properties. From these receipts he deducted claimed expenses and such unclaimed expenses as were found in the course of the examination of the income tax returns, and thus arrived at net income. For the years 1939 and 1940, since claimed expenses could not be ascertained because returns and expense records were not available, net income was determined by applying to gross receipts for these 2 years shown in the Hill report the average percentage of net income from profession to gross receipts from profession based on the 2 succeeding years, 1941 and 1942. (R. 93-94.)

In determining the deficiency for the year 1949, the Commissioner added to the net income reported by taxpayer $2,936.85 for unreported dividends, $863.15 for unreported interest, $5,655.59 for understatement of net profit from profession, and $100 for a disallowed tax deduction. He allowed additional deductions of $67.58 for interest paid and $120 because of a mathematical error in the return. (R. 94.)

The amounts of net income as reported for the years 1939-1949 and as determined by the Commissioner are as follows (R. 94-95):

Year	Net Income Reported	Net Income Determined by the Commissioner
1939	$ 4,555.56	$ 12,681.05
1940	5,615.83	20,093.99
1941	7,632.84	35,137.76
1942	8,477.53	48,753.90
1943	6,884.68	49,174.25
1944	12,134.10	94,601.66
1945	19,950.18	80,225.42
1946	18,212.16	126,627.00
1947	115.81	84,342.75
1948	17,828.99	97,874.95
1949	35,950.50	45,318.51

The Commissioner thus did not use the net worth method to determine taxpayer's true income, but instead determined taxpayer's income from specific taxable sources, professional receipts, dividends, interest and gains from sale of properties. (R. 93-94.)

A net worth statement purportedly reflecting assets, liabilities, and nondeductible expenses of taxpayer for the years 1939-1948 was prepared by another accountant employed by him. That net worth statement was presented in evidence on behalf of taxpayer as correctly disclosing net income for those years as follows (R. 95):

Year	Amount
1939	$30,773.28
1940	58,541.04
1941	55,529.22
1942	56,770.86
1943	55,685.22
1944	19,728.82
1945	53,847.59
1946	50,666.92
1947	74,389.45
1948	73,922.44

The accountant who prepared the net worth statement made an extensive search to determine all of the investments made by taxpayer, and received some help from him. All items of property discovered by him or the Government agents are included in the net worth statement. However, the amount of cash on hand shown on the net worth statement is based, at lease as of January 1, 1939, and as of the end of the years 1939, 1940, and 1941, upon statements made to him by taxpayer. (R. 96-97.) The net worth statement showed cash on hand as follows (R. 97):

January 1, 1939	$ 46,000
December 31, 1939	71,000
December 31, 1940	111,000
December 31, 1941	142,943
December 31, 1942	175,443
December 31, 1943	184,143
December 31, 1944	106,943
December 31, 1945	125,163
December 31, 1946	96,563
December 31, 1947	2,063
December 31, 1948	36,649

The Commissioner's method of determining net income is more accurate than the net worth method in the circumstances of this case; the Commissioner's determinations of net income for the years involved are correct. (R. 97.)

In his return for each of the years 1944, 1945, and 1948, taxpayer omitted gross income received by him during such year that was in excess of 25 per cent of the gross income stated in the return. After a plea of *nolo contendere*, taxpayer was convicted by the District Court, Southern District of California, Central Division, on two counts for violations of Section

145(b), Internal Revenue Code of 1939, such counts representing the years 1947 and 1948. (R. 98.)

The Tax Court concluded with the finding that the returns of the taxpayers for the years 1939-1942, inclusive, and the returns of taxpayer Furnish for the years 1943-1948, inclusive, were false and fraudulent with intent to evade tax, and a part of the deficiency determined for each of the years 1939-1948, inclusive, is due to fraud with intent to evade tax. Such fraud was that of taxpayer Furnish alone. (R. 98.)

As to the question of whether the returns for 1939 through 1942 were joint or only the separate return of taxpayer, the Tax Court, in its opinion, found that the returns were signed by Mrs. Funk, were intended to be and were in fact joint returns. (R. 106-107.) The income shown on the returns from taxpayer's medical practice was community property under California law, and this income had to be reported either in its entirety in a joint return, or Mrs. Funk could report her half in a separate return. She did not file any separate returns for the years 1939-1942. (R. 107.) Her contention that she signed under duress was rejected by the Tax Court as based on insufficient evidence. (R. 108-109.) Accordingly the Tax Court held that the returns filed for the years 1939-1942, inclusive, were joint returns of taxpayers, and that each of them is jointly and severally liable for the deficiencies and additions to tax for fraud determined by the Commissioner for those years. (R. 109.)

SUMMARY OF ARGUMENT

I. The Tax Court correctly upheld the Commissioner's determination of deficiencies for each of the taxable years 1939 through 1949. The findings of the Tax Court are supported by evidence and are not clearly erroneous. Taxpayer concedes that he grossly understated his taxable income for eleven successive years and that his aggregate actual income was at lease five times as much as he reported. The Commissioner has determined a larger aggregate, year by year, which clearly reflects taxpayer's actual income for each year. The Commissioner's determination is based upon direct proof of taxpayer's actual income from several sources. The exact amounts of income from interest, dividends and capital gains on real estate are not disputed and the amount of taxpayer's professional expenses is likewise undisputed. The only issue in the case is whether the determination of the taxpayer's gross professional receipts is supported by evidence.

This determination is based upon an extensive audit by taxpayer's accountant of gross receipts from patients, furnished to the Commissioner by taxpayer expressly for the purpose of showing his gross receipts. The accountant made a complete examination of all the patient record cards, in taxpayer's office, aided by consultation with taxpayer's two office employees, familiar with the records, and with taxpayer himself. Taxpayer is precluded from attacking the determination based on his own audit. On ordinary rules of evidence applicable to tax cases, the Commissioner was entitled to accept the taxpayer's au-

thorized audit as admitted proof of his actual gross professional income.

Even if the audit were not furnished by taxpayer himself, it amply supports the determination, since it was carefully checked by a revenue agent, who also consulted with the taxpayer's employees, and whenever they could not answer any question on a particular card, the agent took it up with the taxpayer himself.

Taxpayer's attack upon the determination of his income is without substance. The net worth statement, upon which taxpayer mainly relies, is accurate only as a determination that taxpayer's income was not less than the amount shown by use of the method. It falls before a computation made from taxpayer's actual records which shows that the income is larger than shown by the net worth method. Moreover, in this case the accuracy of the net worth statement depends upon taxpayer's unsupported assertions of opening cash and subsequent accumulations of cash, which constitute 48 per cent of the total assets shown on the net worth statement. Hence, the net worth statement cannot rebut the direct and positive proof of actual income shown by the audit of taxpayer's records aided by those familiar with the records, including taxpayer himself. The Commissioner did not accept the net worth statement as an accurate statement of taxpayer's assets, nor can the Commissioner be compelled to accept a taxpayer's net worth statement. On the contrary, the Commissioner is authorized by statute to select the method that clearly reflects income, and he is authorized to reject unsupported assertions of cash accumulations.

The taxpayer's claim that the audit was defective because some of the records were ambiguous is answered by the fact that the audit is not based upon the records alone but upon the records and the interpretation of the records by the persons, including taxpayer himself, familiar with the records. Taxpayer's further contention that the audit is defective, because taxpayer was ill for four months in one year and that it was impossible for him to do as much business as the audit showed, is not based upon any established facts but only upon unsworn assertions of the taxpayer, not directly testified to at the hearing.

II. The Tax Court correctly found that taxpayer filed a false and fraudulent return with intent to evade taxes for each of the years 1939 through 1948 so that the assessment and collection of deficiencies of the tax years is not barred by the statute of limitations and taxpayer is subject to the additional tax provided by Section 293(b).

The findings of fraud, on which the statute of limitations and additional taxes rest, are amply supported by undisputed evidence of a repeated pattern of gross understatements of income for ten successive years, concealment of income and admissions of the taxpayer. This evidence is more than sufficient to support the finding of fraud. None of the cases cited by the taxpayer are in point. The proof of fraud does not depend upon Duelke's credibility; but Duelke's credibility in any event is not before this Court, and his credibility is supported by the record. The disposition of the criminal charges is irrelevant.

III. The Tax Court correctly held that the returns filed for 1939 through 1942 were joint returns of the

husband and wife making each liable for any deficiencies with respect thereto under Section 51(b) of the 1939 Code. The facts on this branch of the case are not in dispute. The appeal is based solely on the ground that, as a matter of law, a wife who signs a joint return cannot be held liable for any deficiencies, based on fraud, in the absence of fraud on her part. Section 51(b) of the 1939 Code, however, imposes joint and several liability for all deficiencies upon both husband and wife, signing a joint return, regardless of participation in, or knowledge of, fraud. Section 51(b) was expressly changed in 1938 to impose such joint and several liability, after a decision by this Court construing the prior statute as not providing for such joint and several liability. Since the 1938 Act, the Third, Fifth and Sixth Circuits have squarely held that a wife is liable for all deficiencies, including the additions of fraud, regardless of her participation in or knowledge of the fraud. It is administratively impossible to draw a line based on the degree of the wife's knowledge or lack of knowledge of her husband's fraud or her benefits therefrom. Moreover, the liability imposed by Section 51(b) is the established civil liability of general partners or cosigners for each other's acts.

ARGUMENT

I

The Tax Court Correctly Upheld The Commissioner's Determination Of Deficiencies For Each Of The Taxable Years 1939 Through 1949

A review of the detailed findings and the carefully reasoned opinion of the Tax Court demonstrates that

its decision is correct, its findings are supported by evidence and are not clearly erroneous. *Pool* v. *Commissioner*, 251 F. 2d 233, 247 (C.A. 9th), certiorari denied, 356 U.S. 938, rehearing denied 356 U.S. 978.

A. *Taxpayer concedes that he grossly understated his taxable income for eleven successive years*

The deficiencies in question cover eleven successive calendar years, from 1939 through 1949. Taxpayer does not contest the deficiency determination for 1949 and further concedes a gross understatement of taxable income for each of the other ten years. Taxpayer's reported income for the ten-year period, 1939-1948, ranged from $4,555 in 1939 to $17,828 in 1948 for a total reported income for this period of $101,-407. This reported income is admittedly not a true statement of income for any one of these years. Taxpayer now admits that his aggregate actual income for this ten-year period was at least five times as much as he reported, or $529,854. (Br. 12.)[1] The Commissioner has determined a larger aggregate of $649,512. (R. 99.)[2] The year by year comparison

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[1] This is the original net worth figure supplied by the taxpayer. (Ex. 1; R. 126.) The Tax Court corrected it to $590,646 by adding adjustments developed at the hearing. (R. 100.)

[2] While the difference between the aggregate net income for this period as determined by the Commissioner and as claimed by the taxpayer is $120,000, the difference in tax deficiencies is nearly twice as much, because the taxpayer, in reconstructing his income by a net worth analysis has, largely through variations in the item of cash on hand, distributed his income evenly through the years. Thus, the deficiencies asserted by the Commissioner for the eleven

of the taxpayer's reported net income, the Commissioner's determination and taxpayer's reconstruction of net income is set forth in the statement of facts, *supra.* As we shall show below, taxpayer by his authorized agents admitted that the Commissioner's determination of the greater amount clearly reflected his actual income.

B. *The Commissioner's determination clearly reflects taxpayer's income*

1. *The item of income in controversy is taxpayer's gross professional income*

The foregoing differences between the Commissioner's determination of taxpayer's income and the taxpayer's presently claimed income rest upon the determination of the taxpayer's gross professional income, since the correct amount of taxpayer's income for each of the years in qupestion from other sources is not in dispute. These other sources include interest, dividends, and capital gains on real estate transactions, for a total of $70,351 for the eleven-year period.[3] The amount of the taxpayer's professional expenses are undisputed since the Commissioner allowed all claimed. (R. 374.) The issue in this case thus reduces itself to the question whether the determination of the taxpayer's gross profes-

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years amount to $332,780 plus additions for fraud of $168,477 for a total of $501,257. (R. 16, 28-29.) Taxpayer admits deficiencies of $196,620 plus additions for fraud, if the findings of fraud are upheld, of $100,392 for a total of $297,012 (Br. 18) or a difference of $204,245.

[3] Dividends are shown at R. 23, 24, 25, 26 and 40; interest, at R. 40; and capital gains, at R. 45, 48.

sional receipts by the Tax Court is supported by the evidence.

2. *The Commissioner's determination of the taxpayer's gross professional income is based upon the taxpayer's own audit*

It is difficult to see how the taxpayer here can object to the determination that has been made, for it is based upon an audit furnished to the Commissioner by the taxpayer himself. When the taxpayer was first approached by revenue agents, he claimed that he did not have all of the records that would show his income from payments received from his patients. (Br. 10; R. 90.) But in August, 1949, the taxpayer's attorney agreed to supply all of the records and furthermore stated (R. 357)—

> that there would be no longer a claim that there were files lost, and that they were going to make an audit of the record cards, patient record cards, in order to determine the amount of income Dr. Furnish had received and would present this audit to the Government.

This audit was subsequently made by the taxpayer's own accountant, Harry K. Hill, a certified public accountant, and turned over to the Government by taxpayer's authorized attorney in June, 1950, at a conference at which the accountant was present and explained his audit. (R. 358-360.)[4] The audit was an extensive one, based upon the accountant's complete examination of all the patient record cards

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[4] Hill did not testify at the hearing before the Tax Court because he was ill and the time of his recovery was indefinite. (R. 395-396.)

in taxpayer's office, aided by consultation with taxpayer's two assistants, who were familiar with the records and with taxpayer himself. (R. 101, 460, 472.) Taxpayer is precluded from attacking the determination based on his own audit. *Anderson* v. *Commissioner*, 250 F. 2d 242, 248 (C.A. 5th). On ordinary rules of evidence, this admission is sufficient to support a finding by the trier of the facts, that his income was as so stated. IV Wigmore on Evidence (Third ed.), Sec. 1078. As Wigmore declares:

> He who sets another person to do an act in his stead as agent is chargeable in substantive law by such acts are are done under that authority; so too, properly enough, admissions made by the agent in the course of exercising that authority have the same testimonial value to discredit the party's present claim as if stated by the party himself.

There is no question that the audit in this case was authorized by the taxpayer.

No different rule is applicable to a tax case. Thus, the Fourth Circuit in *Burka* v. *Commissioner*, 179 F. 2d 483, upheld a deficiency determination, where the Commissioner had adopted the audit by taxpayer's accountant of bank deposits and sales slips to determine gross income from the taxpayer's laundry business.

3. *The audit amply supports the determination, even if it were not supplied by the taxpayer*

When the revenue agents received the audit of taxpayer's gross receipts made by his accountant, Agent Ness carefully checked it, sampling 3,900 of

the 20,000 cards. (R. 360, 364, 369.) The special agent also consulted with the taxpayer's two office employees who were familiar with the records; and whenever they could not answer any question on a particular card, the special agent took it up with the taxpayer himself. (R. 101, 401, 406.) As the special agent testified (R. 406):

> * * * we consulted freely with Rose Saunders and Irma Wheeler in the office, and with Dr. Furnish when he was available, and when these questions arose at that time, we consulted with whoever was available and we determined what that card reflected.

The agent's sampling disclosed some discrepancies between the audit as made by taxpayer's accountant and the records, but these discrepancies were generally in favor of the taxpayer and were accepted unchanged by the Commissioner. (R. 92, 435.) The case at bar is a simple one in which the taxpayer's true income, grossly understated in his returns, has been determined by establishing the actual income received by the taxpayer from his several sources of income. Only one source of income is in dispute, namely his gross professional receipts, but these have been established from his own records, by his own accountant, aided by the taxpayer himself and his own employees. In short, this case is one in which the Commissioner has determined the taxpayer's income to be what he said it was.

4. *Taxpayer's attack upon the determination of his true income is without substance*

(a) The net worth statement does not clearly reflect income

The taxpayer has placed his main attack upon the Commissioner's determination of his income, upheld by the Tax Court, on the contention that the net worth analysis of taxpayer's income, prepared by another accountant, more accurately reflects the taxpayer's income than does income as shown by the audit. (Br. 20-22.) The attack fails because a net worth reconstruction of income is not direct proof of income, whereas the audit is direct proof of actual income from the original entries. See *Bechelli* v. *Hofferbert*, 111 F. Supp. 63 (Md.).

It is hardly necessary to labor the point that a net worth statement is a reconstruction of income based upon circumstantial evidence, dependent upon a discovery of all assets from which the existence of income can be inferred, useable where no adequate, or only false records are available. *Holland* v. *United States*, 348 U. S. 121; *Remmer* v. *United States*, 205 F. 2d 277, 287 (C.A. 9th), reversed on other grounds, 347 U. S. 450. A critical item in a net worth reconstruction of income is cash—opening cash and subsequent cash accumulations. This cash item is especially critical in the case at bar, since the net worth statement shows on its face that opening cash and cash accumulations for the eleven-year period constituted 48 per cent of total assets. The critical amount of cash is not established here by any independent evidence, as required by the decided cases.

Holland v. *United States*, *supra*, *Friedberg* v. *United States*, 348 U. S. 142; *Anderson* v. *Commissioner*, 250 F. 2d 242 (C.A. 5th). Taxpayer's claim of cash was not established by any records whatever. (R. 242-244, 249, 382.) Indeed, taxpayer's accountant testified that he had no way at all of verifying the taxpayer's statement of his opening cash in the substantial amount of $46,000 (R. 353, 376); and the estimated amounts of subsequent accumulations of cash, furnished to the accountant by the taxpayer, had to be revised by the accountant in the light of known expenditures (R. 244-245). The net worth statement is thus nothing more than taxpayer's assertion of his gross income, not made under oath or subject to cross-examination; and uncorroborated by any cash records of bank deposits or other methods of keeping the alleged cash. It is not competent proof and it certainly cannot rebut the evidence of income shown by an audit of taxpayer's records, aided by those familiar with the records, including taxpayer himself. *Smith* v. *United States*, 348 U. S. 147.

Contrary to taxpayer's assertions (Br. 21-22) the Commissioner did not accept the net worth statement as an accurate statement of the taxpayer's assets. On the contrary, as Agent Ness testified, had the Government intended to rely upon the net worth statement, it would have made "a close inquiry on the cash figures." (R. 428.) Plainly, the Commissioner cannot be compelled to accept a net worth analysis, and he is as a matter of law and reason authorized to determine taxpayer's income from his records rather than from his unsworn assertions. *Miller* v. *Commissioner*, 237 F. 2d 830 (C.A. 5th).

In the *Miller* case, the precise contention of taxpayer here was rejected by the court on the two-fold ground that (a) the Commissioner has statutory discretion under Section 41 of the 1939 Code, *supra*, to select the method that clearly reflects income, and (b) the net worth method depends upon taxpayer's assertion of past cash accumulations which the Commissioner need not accept. In this case, as in the *Miller* case, the Tax Court properly rejected taxpayer's claim of opening cash. (R. 100.)

(b) There are no errors in the audit

The taxpayer's second ground of objection to the determination based upon the audit of his records is that some of the records are ambiguous. Thus the taxpayer says (Br. 23):

> To rely on the method used by the respondend to determine the taxable income of the petitioner would be resorting to conjecture and surmise of the worst order. It is clear from the testimony of witnesses who were familiar with the records of the petitioner that one could not determine from an inspection of the record whether an item was paid or whether the patient was merely given a credit without any payment having been made.

But the short answer to this contention is that the Hill audit and the check made by Agent Ness did not rely upon the records alone, but upon the records and the interpretation of the records by the persons, including taxpayer himself, familiar with the records. All of taxpayer's argument about wavy lines and other symbols on the cards is beside the point; the office employees knew what each card meant (R. 462-

463, 473); and they were freely consulted by both Hill and Agent Ness.

(c) The other objections are unsupported by any evidence

Taxpayer makes two last points in his attack on the deficiency determination, neither of which is based upon established facts; namely, that the taxpayer did not practice medicine for four months in 1944, and that it was not possible for the taxpayer to do as much business as the Hill report showed. (Br. 24.) These are not established facts, but assertions reportedly made by the taxpayer to a witness; they were not testified to directly by the taxpayer, or anyone else having competent knowledge of the facts, directly at the hearing under oath and subject to cross-examination. Obviously, this sort of "proof" proves nothing except that the assertions were made. See *Meier* v. *Commissioner*, 199 F. 2d 392 (C.A. 8th). As the Tax Court stated in its summary of the evidence (R. 100-102), the determination of the taxpayer's actual income is based upon an extensive audit made by an agent of the taxpayer and presented to the Commissioner by the taxpayer for the express purpose of showing his gross income. It thus furnished "strong support" for the Commissioner's determination. (R. 101.) The Commissioner, however, did not let the matter rest there. His agents checked the audit against the cards, aided by taxpayer himself and his employees. As the Tax Court rightly concluded (R. 101):

> In these circumstances, the Hill report is powerful evidence that petitioner received the amount of the fees shown therein.

II

The Tax Court Correctly Found That Taxpayer Filed A False And Fraudulent Return With Intent To Evade Taxes For Each Of The Years 1939 Through 1948 So That The Assessment And Collection Of Deficiencies Of The Tax Years Is Not Barred By The Statute Of Limitations And Taxpayer Is Subject To The Additional Tax Provided By Section 293(b)

The findings of fraud, on which the bar of the statute of limitations and additional taxes rest, are amply supported by undisputed evidence of a repeated pattern of gross understatements of income for ten successive years,[5] concealment of income and admissions of the taxpayer. Even with the elimination of capital gains and stock dividends, alleged to be innocent errors (Pet. Br. 28-29), the taxpayer concedes, as noted above, gross undertatements of other income, and the Commissioner has proved more than taxpayer now admits. It is not necessary on the fraud issue for the Government to prove the exact amounts of unreported income. *Remmer* v. *United States, supra.*

The fact of unreported income for ten successive years is alone sufficient evidence to support the finding of fraud. *Holland* v. *United States, supra*; *Bender* v. *Commissioner* (C.A. 7th), decided July 1, 1958 (58-2 U.S.T.C., par. 9650) (7 years); *Harber* v. *Commissioner*, 249 F. 2d 143 (C.A. 6th) (7 years), certiorari denied, 355 U. S. 955; *Anderson* v. *Commissioner*, 250 F. 2d 242 (C.A. 5th) (4 years); *Schwarzkopf* v. *United States*, 246 F. 2d 731 (C.A.

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[5] The Tax Court found no fraud for 1949. (R. 105.)

3d) (6 years); *Harris* v. *Commissioner*, 174 F. 2d 70 (C.A. 4th) (6 years); *Rogers* v. *Commissioner*, 111 F. 2d 987 (3 years); *Seifert* v. *Commissioner*, 157 F. 2d 719 (C.A. 2d) (5 years). Taken with the other circumstances in this case, the proof of fraud is as strong as it can possibly be. Thus, taxpayer falsely told the revenue agents at the commencement of the investigations that he did not own the real property and that he had lost some of his patient records. He refused to install an accurate bookkeeping system. Taxpayer used many devices to conceal his ownership of property, taking of title of property in the name of nominees, using cash, especially bills of small denominations, to make substantial purchases, and sending patients' checks to a sister in Kansas. There is, further, his undenied admission to the revenue agent that he may have been guilty of evasion. All of these circumstances, noted the Tax Court, "afford strong and powerful proof" that the returns were false and fraudulent and that the "wide discrepancies were not the result of innocent mistakes but were part of a calculated plan to defraud the Government". (R. 103, 104.)

The cases cited by the taxpayer (Br. 24-26) are not in point. *Wiseley* v. *Commissioner*, 185 F. 2d 263 (C.A. 6th), is clearly distinguishable on its facts. In that case the taxpayer-doctor quickly remedied his negligent failure to report income before any question was raised by the Commissioner. The facts in the case at bar are more like those in *Harber* v. *Commissioner*, *supra*, where the Sixth Circuit held that a doctor who had failed to report substantial in-

come from his professional fees and real estate transactions was guilty of fraud and was not to be excused by a claim of "busyness" or incompetent office help.

Taxpayer's factual objections to the proof of fraud have little weight. The fact that the taxpayer here may have had other reasons for secreting income, strenuously argued by taxpayer (Br. 27-28), does not excuse his failure to report the income on his tax return. *Lipsitz* v. *Commissioner*, 21 T. C. 917, 937, affirmed, 220 F. 2d 871 (C.A. 2d). The evidence of other purposes simply comes from the statement of nominees as to the reasons given to them by the taxpayer for his use of their names; and obviously; as they said, they would not have allowed the taxpayer to use their names if he had told them that he was doing so in order to evade taxes. (R. 238, 301.) Nor is it important or competent for this Court to weigh the credibility of the taxpayer's business agent, Duelke. The Tax Court's finding of fraud does not, as taxpayer asserts (Br. 29), rest upon Duelke's testimony. His testimony that taxpayer was not worried about a Government investigation is only one item of evidence of fraud. This case stands without it. But in any event, Duelke's testimony is credible. The taxpayer himself did not take the stand to deny the statement attributed to him by Duelke; and Duelke's credibility is not in any way impeached by the testimony of Anspach. At best Duelke and Anspach had different recollections of a conversation that took place ten years ago. Moreover, Anspach himself is a character witness for Duelke; Duelke seemed to him to be a "high class man". (R. 391.)

Taxpayer's reference to the statement by Judge Yankwich (Br. 31) in connection with the criminal prosecution is, as the taxpayer himself notices, irrelevant. *Helvering* v. *Mitchell*, 303 U. S. 391. Furthermore, at the hearing before Judge Yankwich, taxpayer's attorney urged that the 50% addition to tax for fraud was punishment enough. (Ex. 4, p. 5.)

In sum, the finding of fraud in this case rest upon the undisputed gross understatement of income for ten years, together with the surrounding circumstances of failure to keep records, concealment of assets, and admissions of evasion. On the basis of this record supported finding, it follows that none of the deficiencies for the early tax years was barred by the statute of limitations, and further that the statutory additions for fraud are applicable to each of the tax years.

III

The Tax Court Correctly Held That The Returns Filed For 1939 Through 1942 Were Joint Returns Of The Husband And Wife, Making Each Liable For Any Deficiencies With Respect Thereto Under Section 51(b) Of The 1939 Code

This branch of the case involves the liability of Mrs. Funk, who was the wife of the taxpayer from 1923 until their divorce in 1944, for the deficiencies assessable on their joint income for four tax years, 1939 through 1942, in the amount of $52,931.87. (R. 22.)

The facts are not disputed (Funk Br. 2) and are set forth in the findings and opinion of the Tax Court

(R. 106-110). There is no question that Mrs. Funk signed the returns, knowing they were joint tax returns. (R. 108, 445-446.) Her appeal is based upon the contention that, absent any fraud on his part, she cannot be held liable for any deficiencies whatever, since the tax years are otherwise barred by the statute of limitations. A person, counsel contends, should be liable "on what they sign or from which they benefit." (Funk Br. 4.)

We submit that Mrs. Funk is simply being held liable here on what she signed. Section 51(b), *supra*, clearly specifies that the liability of a husband and wife on a joint return with respect to the tax shall be "joint and several;" and the decided cases hold that both spouses are liable regardless of who is the actor in the fraud.

A. *The legislative history of Section 51(b) shows that Congress clearly intended to impose joint and several liability on the husband and wife as a condition to the privilege of securing the benefit of lower tax rates by a joint return*

The Congressional intent is expressly disclosed by specific amendment. Prior to 1938, Section 51(b) appeared in the Revenue Act of 1936, c. 690, 49 Stat. 1648, which read as follows:

> (b) *Husband and Wife.*—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—
>
> (1) Each shall make such a return, or
>
> (2) The income of each shall be included in a single joint return, in which case the

tax shall be computed on the aggregate income.

This provision was construed by this Court as *not* imposing joint and several liability. *Cole* v. *Commissioner*, 81 F. 2d 458. Its decision was followed by other circuits. *Crowe* v. *Commissioner*, 86 F. 2d 796 (C.A. 7th); *Commissioner* v. *Rabenold*, 108 F. 2d 639 (C.A. 2d); *Sachs* v. *Commissioner*, 111 F. 2d 648 (C.A. 6th.) Contra: *Moore* v. *United States*, 37 F. Supp. 136, (C. Cls.), certiorari denied, 314 U.S. 619, rehearing denied, 314 U.S. 706.

Because of the *Cole* decision, Congress in Section 51(b) of the Revenue Act of 1938, c. 289, 52 Stat. 447, 476, changed the language of the section to expressly provide that the liability shall be joint and several. That language was re-enacted into Section 51(b) of the 1939 Code, controlling here.

While the language of Section 51(b) of the 1938 Act speaks for itself, for the information of this Court, the following authoritative explanation of the section by the Report of a Subcommittee of the Committee on Ways and Means, 75 Cong., 3d Sess. (House Hearing, Revision of Revenue Laws, 1938, pp. 57-58) is printed:

JOINT AND SEVERAL LIABILITY ON THE PART OF HUSBAND AND WIFE FILING JOINT INCOME RETURNS

The Congress has long granted the privilege of filing joint returns to husbands and wives living together (see sec. 51(b)(2) of the Revenue Act of 1936). If such a return is filed the

tax is computed upon the aggregate net income of the two spouses and in many cases is less than the taxes would be if the spouses filed separate returns.

Since a joint return does not show the respective incomes and deductions of the husband and wife, individually, and since under the statute a single tax is computed upon the aggregate income, the Bureau of Internal Revenue has taken the position for many years that the filing of such a return by husband and wife creates a joint and several liability on their part for the tax on their aggregate net income; and that deficiencies, penalties, and interest may be collected from either or both of them.

The Bureau's interpretation has been sustained by the Board of Tax Appeals in various cases but was rejected by a divided court in *Cole* v. *Commissioner* (81 F. 2d 485).

In the opinion of your subcommittee the Bureau's position is sound; and to avoid further confusion and litigation it is recommended (Recommendation No. 41) that an amendment be inserted in the statute to make it clear that if a husband and wife choose to file a point return, each of them will be liable for the tax upon their aggregate income, and for any deficiencies, penalties, and interest in respect of the joint return which may thereafter be determined. Unless the husband and wife the to be held jointly and severally liable for the tax upon their aggregate net income it will be necessary for the Bureau to require that their individual incomes and deductions shall be separately stated in the return, in order that their respective income-tax liability may be separately

determined. Such a requirement would cause considerable hardship upon taxpayers with moderate incomes and would largely eliminate the advantages of the joint return.

The Subcommittee's Recommendation No. 41 referred to in the above report, reads as follows (House Hearings, *supra*, p. 85):

JOINT AND SEVERAL LIABILITY ON THE PART OF HUSBAND AND WIFE FILING JOINT INCOME RETURNS

Recommendation No. 41.

It is recommended that there should be expressly stated in the Revenue Act that there is a joint and several liability for tax on the part of husband and wife on the filing of joint returns and that a joint deficiency notice is proper in such cases.

There can, therefore, be no doubt that Congress intended that a person signing a joint return becomes liable for all deficiencies.

B. *The decided cases have squarely carried out the plain terms of the statute and held a spouse liable for all deficiencies, including those for fraud, regardless of participation in the fraud*

Following the 1938 Act the courts have squarely held that a wife is liable for all taxes including the additions for fraud, regardless of her participation in or knowledge of the fraud. *Howell* v. *Commissioner*, 175 F. 2d 240 (C.A. 6th); *Kann* v. *Commissioner*, 210 F. 2d 247 (C.A. 3d), certiorari denied, 347 U. S. 967; *Boyett* v. *Commissioner*, 204 F. 2d 205 (C.A. 5th); *Sullivan* v. *Commissioner* (C.A.

5th), decided May 26, 1958 (58-2 U.S.T.C., par. 9563); see also *Commissioner* v. *Uniacke*, 132 F. 2d 781 (C.A. 2d).[6] The *Howell* court, like the Tax Court below, said that this result is required by the statute (175 F. 2d 241):

> We think petitioner's contention has no merit. Petitioner seeks in effect to have this court amend Sec. 51(b) of the Revenue Act of 1938 by holding that under the circumstances there described the liability of husband and wife with respect to the tax shall be joint and several in case only of non-fraudulent returns. The courts are not authorized to make changes in statutes, and the express wording of Sec. 51(b) requires the contrary conclusion. The 50% penalty is required by the statute under this record, Sec. 293(b), Internal Revenue Code, 26 U.S.C.A. Sec. 293(b), and is a civil penalty. *Helvering* v. *Mitchell*, 303 U. S. 391, 58 S. Ct. 630, 82 L. Ed. 917. The deficiencies in income tax constitute a civil liability. The existence of liability both for the penalties and the deficiencies is determined by the wording of Sec. 51(b), which makes no distinction as to whether the transactions out of which the liability arises are fraudulent or nonfraudulent.

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[6] The dicta in *Macias* v. *Commissioner* (C.A. 7th), decided May 7, 1958 (58-1 U.S.T.C., par. 9507), rests upon erroneous view that the additions for fraud are separate penalties, not part of the tax. See *Helvering* v. *Mitchell*, 303 U. S. 391. But even on this premise, the wife would be liable for the deficiencies on the true income, apart from the "penalties". It is also to be noted that the Subcommittee Report, *supra*, including penalties, was not called to the Court's attention.

> The Tax Court's findings are supported by ample evidence and are binding in this court. The fact that petitioner was not the moving spirit in the fraud is immaterial on the question of her liability.

It is, we submit, impossible, as Mrs. Funk contends, to draw a line based on the degree of the wife's knowledge or lack of knowledge of her husband's fraud, or her benefits therefrom.

None of the cases cited by counsel for Mrs. Funk are in point. Indeed, as noted, the decision in *Cole* v. *Commissioner*, *supra*, was directly responsible for revision of Section 51(b) which imposes liability on her.

The rule of joint and several liability of joint agents or co-signers for each other's fraud, where only one is guilty of the fraud, is not confined to tax cases; on the contrary, in Code Section 51(b) Congress has simply invoked a general principle of liability of joint partners or co-signers, *Philips* v. *United States*, 59 F. 2d 881 (C. A. D. C.), certiorari denied, 287 U. S. 639; *Brown* v. *Oxtoby*, 45 Cal. App. 2d 702, 709; *Williamson* v. *Clapper*, 88 Ca. App. 2d 645, 650; and see also *Amen* v. *Black*, 234 F. 2d 12 (C.A. 10th), remanded for dismissal on settlement, 355 U. S. 600.

CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

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No. 15942

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Richard Douglas Furnish and Emilie Furnish Funk,

Petitioners and Appellants,

vs.

Commissioner of Internal Revenue,

Respondent and Appellee.

Petition to Review a Decision of the Tax Court of the United States.

APPELLANT RICHARD DOUGLAS FURNISH'S CLOSING BRIEF.

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No. 15942

IN THE

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Richard Douglas Furnish and Emilie Furnish Funk,

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vs.

Commissioner of Internal Revenue,

Respondent and Appellee.

APPELLANT RICHARD DOUGLAS FURNISH'S CLOSING BRIEF.

I.

The Correct Amount of Taxable Income Is Provided More Accurately by Petitioner's Net Worth Statement.

Respondent relies on the Hill audit to establish the income of the petitioner for the years in question. It is conceded that Hill did not testify, and when respondent in his Opening Brief (p. 10) states that Hill examined the patient record cards and that the cards were looked over with employees of the taxpayer, respondent is merely relating what another witness, Agent Marvin H. Ness, testified. In short, Mr. Ness was relating a conversation with Mr. Hill [Tr. of Record, pp. 409-410]. Testimony of witnesses at the time of the hearing before the Tax

Court demonstrated that one could not determine from an inspection of the patient record card whether the item was paid or whether a patient was merely given credit for certain amounts; yet it is the patient record card which was used as the basis for the Hill report. Respondent, in using the Hill report, is resting his case on conjecture and surmise [Tr. of Rec. pp. 461-466; 472-474; 400-419].

Respondent, in his schedule of net income reported for 1945, shows a figure of $19,950.18 (Resp. Br. p. 14). However, the correct figure should be $26,950.18 [Ex. 1; Stipulation, Item 4].

Respondent in his summary of argument (Resp. Br. p. 17) states that the only issue in the case is whether the determination of the taxpayer's gross professional receipts is sustained by the evidence. Petitioner contends that it is appropriate to state that the evidence should be competent and worthy of credence. Evidence such as the Hill report and the testimony of Duelke do not come within that category.

It is interesting to note that the Commissioner refuses to accept the net worth statement of the taxpayer as an accurate statement of his assets, and asserts that the Commissioner cannot be compelled to accept it (Resp. Br. p. 18). Apparently it is too much to expect the Government to be consistent. In case after case the Internal Revenue Service relies on a net worth statement as the basis for asserting tax deficiencies. The respondent did not object at any time to the items set forth in the net worth statement. The net worth statement presented a complete report of the assets of the taxpayer, but respondent prefers to rely on the Hill report, notwith-

standing the fact that one can not tell from the patient record card whether a wavy line means that the item was paid or whether it means that a credit was given without a payment being made. No objections were made by the respondent pertaining to the schedules submitted in the petitioner's net worth statement [Tr. of Rec. pp. 258; 264; 275-276; 279; 281-284; 287-288].

Respondent objects to the net worth statement because he states the net worth statement is based on the taxpayer's statement of his opening cash (Resp. Br. p. 27). Respondent apparently overlooks the testimony of the accountant, Alvin P. Meyers. Mr. Meyers prepared the net worth statement and establishes the logic of the net worth statement when he pointed out that the doctor had to have money in order to spend it [Tr. of Rec. pp. 243-245]. Petitioner in his Opening Brief, pages 20-21, illustrated that the auditor was correct. Dr. Furnish could not buy property and pay for it unless he had cash with which to do it. Therefore, it is reasonable to conclude that he must have had the amount of cash on hand for the years in question, since he acquired additional properties for the identical years. As an illustration, there was a total increase in assets during 1944 of $95,500.00. It is unreasonable to believe that cash amounting to $94,500.00 was acquired during the previous year; but instead, it is the result of the acquisition of money over a number of years. Other illustrations were pointed out in Appellant's Opening Brief, pages 20-21.

It is difficult to believe respondent really means what he says when he states that the argument about wavy lines and other symbols on the cards is beside the point (Resp. Br. p. 28). Petitioner does not rely simply on argument; he is relying on the evidence. The testimony

of witnesses was uncontradicted to the effect that sometimes a wavy line meant the amount had been paid; sometimes it meant the patient had been given a credit; sometimes the word "paid" meant the item was collected; sometimes it meant the account was merely closed out or written off; there were instances when a patient was not financially able to pay and a wavy line was drawn to indicate not to send any more statements [Tr. of Rec. pp. 461-466; 472-474; 400-419].

Ruby Saunders, an employee of the petitioner, stated she told Mr. Hill that a wavy line meant it had been paid or had been cancelled [Tr. of Rec. p. 461]. She did not explain to Mr. Ness what the wavy lines or "cr" meant; she could not state what the insignia "cr" meant on every card [Tr. of Rec. pp. 463-465].

Irma Wheeler, another employee of the petitioner, testified that the wavy line meant that the payment had been made in some cases and in other cases just written off; there would be no way of determining which it was by looking at the card [Tr. of Rec. p. 473]. She could not tell by looking at the card whether "cr" meant the money had been collected or that the doctor had given a credit to the patient; and the word "paid" could have meant that it had been written off or had been uncollectible [Tr. of Rec. pp. 474-475].

II.

Respondent Has Not Sustained Burden of Proof of Establishing Fraud.

Respondent claims that the petitioner, Dr. Furnish, used nominees to report gains derived from the sales of property and thereby evaded substantial amounts of income tax (Resp. Br. p. 7). However, respondent is over-

looking the common impression that people have to the effect there is only a 25% tax on long-term capital gains. Most people are of the opinion that it is only necessary to pay a 25% tax in the event of a long-term capital gain. It is respectfully submitted that one almost has to be an expert on the subject of income tax to realize that there are instances when more than a 25% tax is paid, in the event of a long-term capital gain. The petitioner obviously was in error in thinking that the full tax was paid on the long-term capital gains by the nominees instead of by him, but a mistake in judgment does not constitute fraud.

Respondent refers to the bank accounts being carried in the name of employees or relatives (Resp. Br. p. 8). It should be noted that the accounts in the names of relatives were in small amounts, and are of no real concern. As an illustration, one of the accounts was used by a relative who was looking after the house of the petitioner. It is obvious that this did not constitute any attempt to hide assets.

As far as the account in the name of Herman Duelke is concerned, it should be noted that the account on its face showed that the account did not belong to Herman Duelke; it bore a designation after his name as either "business manager" or "trustee." It is normal practice for doctors to carry their business accounts in the name of the business manager. The business affairs of the office were conducted by Mr. Duelke. The account was carried in his name so he could issue checks without having to get the signature of Dr. Furnish, who was busily engaged in the practice of medicine. The address of Mr. Duelke on the account was the business address

of Dr. Furnish. It is only natural that since Mr. Duelke's business address was the same as the petitioner's and since the account involved the business affairs of the petitioner, that Mr. Duelke should use the business address which was common to both of them.

Respondent makes mention of the testimony of Mr. Duelke wherein Duelke stated that Dr. Furnish would not allow him to install an accurate record system and that the doctor had stated he had been previously investigated and had removed some of his records (Resp. Br. p. 9).

It should be noted that it was the testimony of Duelke that was used by the respondent primarily to show fraud.

As pointed out in Appellant's Opening Brief, pages 29-30, Duelke's credibility collapses when we consider the testimony of Edward Anspach, a disinterested witness. Bias, interest and motive on the part of Duelke are clearly shown in the fact that Dr. Furnish fired Duelke [Tr. of Rec. p. 391].

Mr. Anspach testified that he learned that Duelke was fired from Duelke himself [Tr. of Rec. p. 391], but Duelke even denies that he was fired; he even denies he told Mr. Anspach that he was fired [Tr. of Rec. pp. 454-455]. The only logical conclusion to be drawn from the evidence is that Mr. Duelke took it on himself to sell the Hinton Arms Apartments without any authorization from his employer. When Dr. Furnish first learned about it from Mr. Anspach he was pretty disturbed and was not very happy about it. He did not want to sell the property [Tr. of Rec. pp. 382-392].

Respondent relies on a number of circumstances to establish fraud. It is clearly established that the burden

of proof of establishing fraud is on the respondent. It is suggested that this burden has not been met when we view the set of circumstances in a light which is reasonable and favorable to the petitioner. The use of nominees was due to fear of creditors and the desire on the part of the petitioner that his wife not be informed of his assets; the "25% capital gains tax" was misunderstood by the petitioner, the same as it is misunderstood by most taxpayers. The bookkeeping system was a poor one; the doctor was secretive, but that does not establish guilt of actual fraud with the specific intent to evade income taxes. It is only natural to assume that the doctor, the same as most taxpayers, would believe that the person who receives the dividends would be the individual who would have to pay income tax on them. In this case dividends were received and retained by a nominee; the tax was paid by the nominee.

Conclusion.

Since the net worth statement should be the basis for determining the tax deficiency, and since the respondent did not sustain the burden of proof of establishing fraud, the decision of the Tax Court should be reversed.

Respectfully submitted,

Murray M. Chotiner,

Attorney for Petitioner, Richard Douglas Furnish.

No. 15943

United States Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

vs.

RICHARD HAROLD HANSEN, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana.

FILED
MAY 14 1958
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—5-9-58

No. 15943

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic: and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, District of Montana, Butte Division

Criminal No. 3762

UNITED STATES OF AMERICA, Plaintiff,

vs.

RICHARD HAROLD HANSEN, Defendant.

INDICTMENT

(Title 50 App. U.S.C.A. §462)

The Grand Jury Charges:

Count One

Richard Harold Hansen, a male person subject to the Universal Military Training and Service Act, registered as required by said Act and regulations promulgated thereunder, and thereafter he became a registrant of Local Board No. 7, said board being then and there duly created and acting, under the Selective Service System established by said Act, in the County of Cascade, in the State and District of Montana; pursuant to said Act, and the rules and regulations promulgated thereunder, Richard Harold Hansen was classified 1-AO, and was notified of said classification; and a notice and order by said board was duly given him to report for induction into the Armed Forces of the United States of America, on January 31, 1957, at Great Falls, County of Cascade, State of Montana, for forwarding to an armed forces induction station; and he

was duly forwarded to the Armed Forces induction station at Butte, Montana; and on the 1st day of February, 1957, at Butte, in the State and District of Montana, said Richard Harold Hansen did knowingly fail, neglect and refuse to perform a duty required of him under said Universal Military Training and Service Act, and the regulations promulgated thereunder, in that said Richard Harold Hansen then and there knowingly failed, neglected and refused to be inducted into the Armed Forces of the United States of America, as so notified and ordered to do.

REUBEN A. QUENZER,
Foreman of the Grand Jury.

KREST CYR,
United States Attorney.

[Endorsed]: Filed June 7, 1957.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant, Richard Harold Hansen, moves that the indictment be dismissed on the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. The indictment on its face shows the defendant was classified 1-A-O, and as such is exempt from the duty of being inducted into the Armed Forces but must be assigned to a non-combatant

unit as prescribed by the Executive Orders of the President of the United States.

3. That said indictment on its face shows that this defendant claimed exemption from combatant training in the service because of conscientious objections and that his claim was sustained by Local Board No. 7 named in said indictment, and by reason thereof and the provisions of Title 50 App. Sec. 456 (j), said indictment shows on its face that this defendant performed all of the duties he was required to perform under the Universal Military Training and Service Act, and that said indictment fails to disclose any duty prescribed by law which said defendant failed to perform.

EARLE N. GENZBERGER,
Attorney for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed January 16, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY

This cause was duly called for arraignment and plea this day, the defendant being personally present in Court, and Mr. Krest Cyr, United States Attorney, and Mr. Michael J. O'Connell, Assistant United States Attorney, being present and appearing for the United States.

Thereupon, on motion of Mr. Earle N. Genzberger, Court ordered that his name be entered as counsel for the defendant herein.

Thereupon a motion to dismiss the indictment was presented by counsel for defendant and ordered filed, whereupon said motion was duly argued by counsel for the respective parties, and by the Court taken under advisement.

Thereupon the defendant was duly arraigned and answered that his true name is Richard Harold Hansen, whereupon the indictment was read to the defendant. Thereupon the defendant entered a plea of not guilty to the offense charged herein, whereupon trial of the case was set for Thursday, January 23, 1958, at 10:00 a.m.

Entered in open Court at Butte, Montana, this 16th day of January, 1958.

DEAN O. WOOD,
Clerk.

In the United States District Court, District of Montana, Butte Division

No. 3762

UNITED STATES OF AMERICA, Plaintiff,

vs.

RICHARD HAROLD HANSEN, Defendant.

ORDER

Defendant was charged with a violation of the Universal Military Training and Service Act (Title 50, App., U.S.C.A., Section 451, et seq.) by an in-

dictment which so far as is material here reads as follows:

"Richard Harold Hansen, a male person subject to the Universal Military Training and Service Act * * * was classified 1-AO, and was notified of said classification; and a notice and order * * * was duly given him to report for induction into the Armed Forces of the United States of America on January 31, 1957, * * * and on the 1st day of February, 1957, at Butte, in the State and District of Montana, said Richard Harold Hansen did knowingly fail, neglect and refuse to perform a duty required of him under said Universal Military Training and Service Act and the regulations promulgated thereunder, in that the said Richard Harold Hansen then and there knowingly failed, neglected and refused to be inducted into the Armed Forces of the United States of America, as so notified and ordered to do."

Defendant moved to dismiss said indictment on the ground that it did not state an offense against the United States because on its face the indictment showed that defendant had been classified 1-A-O by his local board and that as a result of such classification he was exempt from the duty of being inducted into the armed forces of the United States by the provisions of Title 50, App., Section 456(j), which reads as follows:

"(j) Nothing contained in this title (Sections 451-454 and 455-471 of this Appendix) shall be construed to require any person to be subject to com-

batant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title (said sections), be assigned to noncombatant service as defined by the President * * *."

Defendant's position in other words is that there is a difference between "induction into the armed forces of the United States" and "induction into the armed forces of the United States for assignment to noncombatant service", and that having classified defendant in class 1-A-O, the local board was without authority to order him to report for induction into the armed forces of the United States, without limiting the induction to induction for assignment to noncombatant service only.

If defendant's position is correct, the indictment must be dismissed because no offense results from the disobedience by the defendant of an invalid order of the local board.

As appears from the indictment, the defendant was classified in class 1-A-O. No question is presented, and indeed no question could be presented at this stage of the proceedings, as to the validity of his classification. Section 1622.11, Selective Service regulations, defines class 1-A-O as follows:

"1622.11 Class 1-A-O: Conscientious Objector Available for Noncombatant Military Service Only.—(a) In Class 1-A-O shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

This section of the Selective Service Regulations brings a person classified 1-A-O by his local board within that provision of Title 50, App., Section 456 (j) above quoted reading as follows:

"Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President."

Thus under both the Selective Service Regulations and the statute itself, the defendant by virtue of his class 1-A-O classification was available for induction for noncombatant military service only.

Noncombatant training and noncombatant service are defined by Executive Order No. 10028 as follows:

"1. The term 'noncombatant service' shall mean (a) service in any unit of the armed forces which is unarmed at all times; (b) service in the medical department of any of the armed forces, wherever performed; or (c) any other assignment the pri-

mary function of which does not require the use of arms in combat; provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.

2. The term 'noncombatant training' shall mean any training which is not concerned with the study, use, or handling of arms or weapons."

Turning again to the indictment we find it is charged that defendant was duly ordered to report for induction into the armed forces of the United States and that defendant did knowingly fail, neglect and refuse to perform a duty required of him under the act in that he knowingly failed, neglected and refused to be inducted into the armed forces of the United States.

It seems to the Court that "induction into the armed forces of the United States" means something different than "induction into the armed forces of the United States for assignment to noncombatant service only". This belief is borne out by the provision found at the beginning of the 6th paragraph of subsection (a), Section 454, Title 50, App., which reads:

"Every person inducted into the Armed Forces pursuant to the authority of this subsection [1] after

[1] Subsection (a) of Section 454 is the subsection of the Act which provides for the induction of persons into the Armed Forces. Thus any person inducted into the Armed Forces is inducted under the authority of said subsection. Section 456(j) of the

the date of enactment of the 1951 Amendments to the Universal Military Training and Service Act (June 19, 1951) shall, following his induction, be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than four months * * *."

This language furnishes a definition of the meaning of the phrase "induction into the armed forces of the United States"; it is a direction by Congress that any person entering the armed forces upon an unqualified induction is to be given full and adequate military training for service in the armed forces into which he is inducted, for a period of not less than four months. Certainly full and adequate military training for service in the Army, Navy, Marine Corps, Air Force or Coast Guard cannot be achieved through "training which is not concerned with the study, use or handling of arms and weapons".

The provision above quoted from subsection (a) of Section 454 was added to the Universal Military Training and Service Act by the 1951 amendments to the Act. The legislative history of the 1951 amendments further illustrates the Congressional intent that inductees into the armed forces under unqualified inductions be given full and adequate military training.

Act above quoted does not itself provide the authority for the induction of conscientious objectors into the Armed Forces, but provides merely that if they are inducted, they shall be assigned to noncombatant service.

House Report No. 271 of March 15, 1951, on the 1951 Amendments to the Universal Military Training and Service Act, which repeats in substance the Senate Report on the 1951 amendments (Senate Report No. 117, February 21, 1951) contains the following statement:

"Under the House bill, each person inducted into the Armed Forces must be given military training for a period of not less than 4 months. It should be noted that this applies not only to men under 19, but to all persons inducted. The proposed section requires 4 months of military training; and this does not include time spent in travel to a training camp or station."

In the section by section analysis of the 1951 amendments, contained in the House Report, the following statement is made:

"The present Selective Service Act requires that individuals inducted into the Armed Forces shall be assigned to stations and units of such forces. The proposed addition to the present law requires that every person inducted into the Armed Forces be given full and adequate military training for a period of not less than 4 months. In addition, the proposed section prevents any person inducted into the Armed Forces from being sent into a combat area located on land for the first 6 months following his induction into the Armed Forces. During the 4 months' training period persons inducted may not be assigned for duty on land outside the United States, its Territories and possessions (including the Canal Zone)."

The Court has found only a few cases which deal with this question. In Shaddy v. United States, 139 Fed. (2d) 754, Shaddy appealed from a conviction for a violation of the Selective Service and Training Act of 1940. Shaddy, classified as 1-A-O, refused to report for induction. At the trial it was stipulated between the United States Attorney and counsel for Shaddy that Shaddy was ordered to report for induction into the armed forces of the United States for noncombatant service. However, the order to report for induction was introduced in evidence and showed that the stipulation was erroneous in that Shaddy was ordered to report for induction into the Armed Forces of the United States for training and service in the army. On appeal, counsel for Shaddy, for the first time, claimed that there was a variance between the allegations of the indictment and the proof and with respect to this point the Court said:

"The contention is based upon the erroneous recital in the stipulation. The order of the local board directed Shaddy to report for induction into the army. It is true that a registrant classified as 1-A-O is subject to noncombatant service only. Nevertheless, such a registrant is subject to induction to a noncombatant division, such as, for example, the Medical Corps. 32 CFR 1940 Supp., Sec. 603.364. There was no variance between the allegations of the indictment and the proof."

The Shaddy case, however, is distinguishable from the present case in that the Selective Training

and Service Act of 1940, under which Shaddy was prosecuted, did not contain the provision requiring that persons inducted into the Armed Forces be given full and adequate military training, which was inserted by the 1951 amendments to the Universal Military Training and Service Act.

Another case dealing with the question involved here is United States ex rel. Weidman v. Sweeney, 117 Fed. Supp. 739. In that case Weidman, classified as 1-A-O, was inducted into the Marine Corps, which has no noncombatant unit and no medical corps. Weidman performed various services in the Marine Corps, but finally departed from his station and was charged with desertion, and while awaiting military trial on the charge of desertion sought a writ of habeas corpus. The Court granted the writ and ordered Weidman discharged, holding that in effect his induction was invalid from the beginning because the Marine Corps, into which he was inducted, had no noncombatant units, no medical corps and that such other assignment as the Marine Corps proposed to give him had not been found acceptable to him prior to his induction, as required by clause (c) of the definition of noncombatant service above quoted.

Upon somewhat similar facts, the Court in LaRose v. Young, 139 Fed. Supp. 516, reached a different conclusion than did the Court in U. S. v. Sweeney, supra. However, it appears from the second paragraph of the opinion in the LaRose case that LaRose "was inducted into the army as a con-

scientious objector available for noncombatant military service only", although the specific induction order had no bearing on the Court's decision. It is clear, however, that if the indictment in the case at bar charged that Hansen "refused to obey an order of induction into the armed forces as a conscientious objector available for noncombatant service only", the problem with which the Court is here concerned would not exist.

The Court is aware of the two opinions of the Court of Appeals for the Ninth Circuit in Hopper v. United States, 142 Fed. (2d) 167 and 142 Fed. (2d) 181. While the first Hopper opinion in that portion thereof covered by headnotes 1 and 2 could be considered authority for the view this Court takes of the case at bar, that opinion was wiped out by the second opinion of the Court en banc in the Hopper case. However, the grounds upon which the first Hopper opinion, in the portion thereof covered by headnotes 1 and 2, held the indictment invalid were not raised by Hopper in either the trial or appellate court, and the second Hopper opinion limited its consideration of the sufficiency of the indictment to those grounds specified in the trial and appellate courts, and the problem with which the Court is here faced was not considered in the second Hopper opinion.

The Court is likewise aware of the line of authority represented by Seele v. United States, 133 Fed. (2d) 1015, and United States v. Ryals, 56 Fed. Supp. 772, cited by the government, to the effect

that an indictment founded on a statute need not negative the matter of an exception made by a proviso or other distinct section of the statute. The problem here involves something more than an exception, however. Here, the indictment, by the allegation that defendant was classified 1-A-O by his local board, affirmatively shows that defendant, under both the law and the Selective Service Regulations, was under the duty of submitting to induction into the armed forces for noncombatant service only. Then the indictment charges the defendant with failing to perform an entirely different duty, and one which under the law he did not owe, by refusing to submit to induction into the armed forces, which, as previously pointed out, under the Universal Military Training and Service Act requires at least four months of adequate military training for service in the armed forces into which he was inducted.

It seems the situation here is in effect the same as it would be in a case where a defendant, after having been found to be physically unfit for any service and placed in Class IV-F by his local board, was ordered by the local board to report for induction and refused to obey the order. Certainly an indictment alleging such facts would not state an offense under the Universal Military Training and Service Act, because the board would be without authority to order the induction of a person classified IV-F.

For the foregoing reasons, It Is Ordered and

this does order that the motion to dismiss the indictment is granted, and said indictment is hereby ordered dismissed.

Done and dated this 7th day of February, 1958.

W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed February 7, 1958.

[Title of District Court and Cause.]

STATEMENT OF DOCKET ENTRIES

1. Indictment for Violation of the Universal Military Training Service Act. (Title 50 App. Sec. 462.) Filed June 7, 1957.

2. Filed Motion to dismiss indictment. Jan. 16, 1958.

3. Plea to indictment of not guilty entered Jan. 16, 1958.

4. Motion to dismiss indictment heard and by the Court taken under advisement. Jan. 16, 1958.

5. Filed and Entered Order granting defendant's motion to dismiss Indictment. Feb. 7, 1958.

6. Notice of Appeal filed March 10, 1958.

Attest:

DEAN O. WOOD,
Clerk.

By N. P. CRONIN,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: The United States of America, in care of the United States Attorney for the District of Montana, Post Office Building, Butte, Montana.

Name and address of appellant's attorney: Krest Cyr, United States Attorney for the District of Montana, Post Office Building, Butte, Montana.

Offense: Richard Harold Hansen, a male person subject to the Universal Military Training and Service Act, registered as required by said Act and regulations promulgated thereunder, and thereafter he became a registrant of Local Board No. 7, said board being then and there duly created and acting, under the Selective Service System established by said Act, in the County of Cascade, in the State and District of Montana; pursuant to said Act, and the rules and regulations promulgated thereunder, Richard Harold Hansen was classified 1-AO, and was notified of said classification; and a notice and order by said board was duly given him to report for induction into the Armed Forces of the United States of America, on January 31, 1957, at Great Falls, County of Cascade, State of Montana, for forwarding to an armed forces induction station; and he was duly forwarded to the Armed Forces induction station at Butte, Montana; and on the 1st day of February, 1957, at Butte, in the State and District of Montana, said Richard Harold Hansen

did knowingly fail, neglect and refuse to perform a duty required of him under said Universal Military Training and Service Act, and the regulations promulgated thereunder, in that said Richard Harold Hansen then and there knowingly failed, neglected and refused to be inducted into the Armed Forces of the United States of America, as so notified and ordered to do.

Concise statement of order, giving date, and any sentence: On February 7, 1958, the Honorable W. D. Murray, District Judge of the above-captioned Court, entered and filed an Order granting the defendant's motion to dismiss the indictment and further ordered said indictment be dismissed. The Order of the Judge is based on a finding that the defendant, who is classified 1-AO by his Local Board as shown in the indictment, was under the duty of submitting to the induction into the Armed Forces for noncombatant service only, whereas the indictment charges the defendant as failing to perform an entirely different duty, and one which under the law the Court finds he did not owe, by refusing to submit to induction into the Armed Forces, which the Court pointed out, under the Universal Military Training and Service Act requires at least four months of adequate military training for service in the armed forces.

Name of institution where defendant now confined: Defendant is not confined, and his bail has been exonerated.

I, the above-named appellant, hereby appeal to

the United States Court of Appeals for the Ninth Circuit from the above stated judgment and order.

Dated this 10th day of March, 1958.

KREST CYR,
United States Attorney for the District of Montana, Attorney for Appellant.

[Endorsed]: Filed March 10, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINT ON APPEAL

The point upon which Appellant, United States of America, will rely on appeal is that the Court erred in dismissing the indictment on file herein, returned against the defendant.

KREST CYR,
United States Attorney for the District of Montana, Attorney for the United States of America, Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 14, 1958.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the United States of America, Appellant, hereby designates for inclusion in the

record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by notice of appeal filed March 10, 1958, the following, which constitutes the entire record in this action:

1. Indictment for violation of the Universal Military Training Act. (Title 50 App. §462), filed June 7, 1957.

2. Motion to dismiss indictment, filed January 16, 1958.

3. Plea of not guilty to indictment entered January 16, 1958.

4. Hearing on motion to dismiss indictment and by the Court taken under advisement January 16, 1958.

5. Opinion and order of the Court granting defendant's motion to dismiss indictment, February 7, 1958.

6. Notice of appeal filed March 10, 1958.

7. Statement of docket entries.

8. Statement of point on appeal.

9. This designation.

KREST CYR,

United States Attorney for the District of Montana, Attorney for the United States of America, Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 14, 1958.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 18 pages numbered consecutively from 1 to 18 inclusive as a full, true and correct transcript, consisting of copies of the following papers designated by the parties, to wit: Indictment, Motion to Dismiss Indictment, Minute Entry on hearing the Motion to Dismiss Indictment, and Plea and Arraignment, Order of Court Dismissing Indictment, Statement of Docket Entries, Notice of Appeal, Statement of Points on Appeal, Designation of Contents of Record on Appeal, and Clerk's Certificate, required by the rule as the record on appeal in Case No. 3762, United States of America vs. Richard Harold Hansen, as appears from the original records and files of said District Court in my custody as such Clerk.

Witness my hand and the seal of said District Court at Butte, Montana, this 18th day of March, A. D. 1958.

[Seal] DEAN O. WOOD,
Clerk,
/s/ By HELEN P. HAXSTEAD,
Deputy Clerk.

[Endorsed]: No. 15943. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Richard Harold Hansen, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: March 20, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15943

UNITED STATES OF AMERICA, Appellant,

vs.

RICHARD HAROLD HANSEN, Appellee.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

The Appellant in the above-entitled cause hereby adopts for its Statement of Points and Designation of Record upon which it intends to rely in this appeal the Statement of Points and Designation of Record heretofore and on the 14th day of March, 1958, filed with the Clerk of the United States District Court for the District of Montana, Butte Division, and served upon counsel for the Appellee and

certified by the said Clerk of the District Court to the Clerk of the United States Court of Appeals for the Ninth Circuit, and hereby respectfully requests that said Statement of Points and Designation of Record be allowed and filed in compliance with Rule 17(6) Rules of this Court.

Dated this 26th day of March, 1958.

/s/ KREST CYR,
United States Attorney for the District of Montana, Attorney for United States, Appellant.

Affidavit of Mailing Attached.

[Endorsed]: Filed March 28, 1958. Paul P. O'Brien, Clerk.

No. 15943

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

RICHARD HAROLD HANSEN,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF OF APPELLANT

KREST CYR
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PAUL P. O'BRIEN, CLERK

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.
RICHARD HAROLD HANSEN,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF OF APPELLANT

OPINION BELOW

The Order of the District Court dismissing the indictment (R. 6-17) is officially reported at 158 F. Supp. 883.

JURISDICTION

The District Court had jurisdiction of the alleged offense by virtue of the provisions of Title 50, U.S.C. App. §462, and Title 18, U.S.C. §3231.

The jurisdiction of this Court rests in §3731, Title 18, U.S.C. which provides that the Courts of Appeals shall have jurisdiction of an appeal from a decision or judg-

ment dismissing an indictment, except where a direct appeal to the Supreme Court of the United States is authorized.

STATEMENT OF THE CASE

This is an appeal from an order dismissing an indictment made and entered by the United States District Court for the District of Montana, Butte Division, on February 7, 1958. The Honorable W. D. Murray was the presiding Judge.

The indictment, returned on June 7, 1957, charged that the Appellee, Richard Harold Hansen, a registrant under the Universal Military Training and Service Act, who had been classified 1-A-0, pursuant to the rules and regulations promulgated under said Act, was notified to report for induction into the Armed Forces of the United States on January 31, 1957, and that on February 1, 1957, said Appellee did knowingly fail, neglect and refuse to perform a duty required of him under said Act, in that he knowingly failed, neglected and refused to be inducted into the Armed Forces of the United States of America, as so notified and ordered.

On January 16, 1958, Appellee filed a motion to dismiss the indictment, alleging that the indictment (1) failed to state an offense against the United States, (2) showed on its face that the Appellee was classified 1-A-0 and as such is exempt from induction into the Armed Forces, but must be assigned to non-combatant duty, (3) showed that the defendant performed all the duties he was required to perform under the Universal Military

Training and Service Act. This motion was argued on January 16, 1958, and taken under advisement by the Court. On February 7, 1958, the Court granted defedant's motion and ordered the indictment dismissed.

The question thus presented is whether an indictment for failure to report for induction which alleges a failure to comply with an induction order to a conscientious objector, classified 1-A-0, to report for "induction into the armed forces of the United States" is sufficient.

SPECIFICATION OF ERROR

The District Court erred in dismissing the indictment returned against the Appellee.

ARGUMENT

The Indictment Was Sufficient And Should Not Have Been Dismissed

In ordering the indictment dismissed, the District Court held that " 'induction into the armed forces of the United States' means something different than 'induction into the armed forces of the United States for assignment to non-combatant service only.' " (R. 10.) It further held that by virtue of his classification of 1-A-0, the Appellee was under the duty of submitting to induction into the Armed Forces for non-combatant service only, so that in refusing to submit to the order which required him to report for "induction into the armed forces of the United States of America" the appellee was not violating any duty imposed by law. The Court held the indictment was insufficient since it charged Appellee with failing to perform a duty which under the law he did not owe. (R. 16.)

The District Court distinguished the case of *Shaddy* v. *United States,* 139 F. (2d) 754, (R. 13), which the Government contended would have sustained the indictment in this case, primarily on the language of 50 U.S.C. App. §454(a), which was not contained in the law at the time of the *Shaddy* decision. The Court relied upon the following language of §454(a):

> "Every person inducted into the Armed Forces pursuant to the authority of this subsection after the date of the enactment of the 1951 amendments to the Universal Military Training and Service Act [June 19, 1951] shall, following his induction be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than four months. * * *"

The Court held that under this provision everyone inducted was subject to military training. (R. 11.) It is to be noted that there are excepted from §454(a) requirement of military training, certain persons, including conscientious objectors. The first sentence of §454(a) specifically provides: "Except as otherwise provided in this Title [§§451-454 and §§455-471 of this Appendix] * * *." §456 of Title 50, U.S.C. provides in subsection (j) for exemption from military training of conscientious objectors. This subsection provides in part:

> "*Nothing contained in this title* [sections 451-454 and 455-471 of this Appendix] *shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who by reason of religious training and belief, is conscientiously opposed to participation in war in any form.* * * * Any person claiming exemption from combatant training and service because of such con-

> scientious objections whose claim is sustained by the local board shall, *if he is inducted into the armed forces* under this title [said sections] *be assigned to non-combatant service* as defined by the President, * * *" (Emphasis supplied.)

It is the contention of the Government that subsection (j) of 50 U.S.C. App. §456 is one of the exceptions provided by subsection (a) of 50 U.S.C. App., §454, and that when §454(a) and §456(j) are read together, the ground upon which the District Court based its order dismissing this indictment is eliminated.

Neither the Universal Military Training and Service Act nor the regulations promulgated thereunder make any provision for a qualified induction into the Armed Forces. 50 U.S.C. App. §456(j) provides, in the case of conscientious objectors, for induction into the Armed Forces, and a subsequent assignment to non-combatant duties. Even in this instance the language of the Act distinguishes between induction and assignment.

The Appellee and the Court below have failed to distinguish between the order directing Appellee to report for induction, and the purpose of his induction. Induction is an unqulaified action through which each person selected for service and training under the Act is received into the armed forces. According to the Act, the obligation to report for induction devolves upon each selectee. The Act additionally provides, out of deference to the religious beliefs of those conscientiously opposed to combatant training for participation in war, that such persons shall be assigned to non-combatant service. The language of §456(j) contemplates, however, that induction will

precede such assignment[1]. There is no limitation concerning the assignment of selectees classified 1-A while those classified 1-A-0 can only be assigned in accordance with the provisions of 50 U.S.C. App. §456(j).

It is apparent that while assignment is a necessary step in the process of training and service under the Universal Military Training Act, it is separate and distinct from induction. Thus, while a person classified 1-A-0 must be assigned to non-combatant service in accordance with the language of the Act, it is not necessary for the induction order to specify this assignment. According to the Act and the regulations promulgated thereunder, a selectee, even though classified 1-A-0 is adequately advised of his duty to report by an order to report for induction into the Armed Forces of the United States.

Since an induction order need not specify the assignment that the selectee is to receive, the order in question imposed a duty upon Appellee to report for induction, and in willfully failing and refusing to do so he was in violation of Title 50 U.S.C. App. §462, consequently the indictment charging him with violating that section was proper and should not have been dismissed.

It is to be presumed that the military authorities will follow the law and assign the Appellee to non-combatant service. He cannot disobey a lawful order for induction merely upon the conjecture that the military would violate the law.

---

[1] §454(a) also speaks of induction as a prerequisite for assignment, as follows: "* * * persons inducted into the Armed Forces for training and service * * * shall be assigned to stations or units of such forces * * *."

The Appellee, and every other selectee classified 1-A-0, while not entitled to have his assignment spelled out in his induction order is protected to the extent that a habeas corpus proceeding may be brought in the event that he is assigned to any but non-combatant service. *Weidman* v. *Sweeney,* 117 F. Supp. 739 (D.C.E.D.Pa). Although the Courts cannot direct that an individual be given a particular military assignment, a Court can order that a petition for habeas corpus be granted unless the military authorities refrain from acts in excess of their jurisdiction over the applicant for the writ. *LaRose* v. *Young,* 139 F. Supp. 516 (D.C.N.D.Calif.); *Nelson v. Peckham,* 210 F. (2d) 574 (C.A.4).

For the reasons stated it is submitted that the induction order was sufficient and that the indictment should not have been dismissed.

It is respectfully submitted that the judgment of the District Court should be reversed.

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No. 15943

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

RICHARD HAROLD HANSEN,

Appellee.

Appeal from the United States District Court for the District of Montana

BRIEF FOR APPELLEE

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JUL - 7 1958

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

RICHARD HAROLD HANSEN,

Appellee.

Appeal from the United States District Court for the District of Montana

BRIEF FOR APPELLEE

STATEMENT

The statement of appellant in its brief as to Opinion Below, Jurisdiction and Statement of the Case is accurate and it is not necessary to here restate such matters. The appellee will proceed immediately to the argument of the case.

ARGUMENT

This case is simple. The Government had two choices to make, either to procure an indictment without mentioning the classification given to the registrant, or merely allege that he was a person subject to induction into the armed forces and refused to submit to induction contrary to the Act. Had the Government framed such an indictment without alleging the classification of the defendant, then the demurrer could not possibly have been sustained. The case is as simple as this.

Suppose the Government had returned an indictment and alleged that the defendant had been classified I-O, which would have obliged him to perform civilian work, and had gone on to allege that he had refused to submit to induction into the armed forces, as was done in this case. Had such been done, no one would have the hardihood to argue that a sufficient indictment was alleged. The indictment on its face would show that the defendant under Section 6 (j) of the Act (50 U. S. C. App. § 456 (j), 65 Stat. 83) would not be under any duty to submit to induction under the Act and the indictment would, on its face, be insufficient.

There is no difference between this hypothetical situation and the situation in this case. The Government chose to frame its indictment in such a manner as would give rise to the presumption of no duty under the Act. The case here is somewhat similiar to *United States* v. *Britton,* 107 U. S. 655, 668-670 (1882).

The case of the Government is similar to the illustration familiar to every school student in study of criminal law. If an indictment charges that a defendant stole a horse the indictment allows the Government to prove the theft of any color horse. But if the indictment alleges that the defendant stole a white horse, then it is not permissible to prove that he stole a black one. If an indictment alleges that a man transported a Buick automobile across the state line, knowing that it was stolen, and the proof shows he transported a Ford automobile, there would be a variance.

While the subject of variance is not involved in this case, the illustrations above set out prove that the Government must allege in an indictment facts sufficient to show the commission of an offense.

Where an indictment alleges facts that give rise to an exemption the responsibility is upon the Government to negative such exemption. The Government here alleges that the defendant was classified in I-A-O. This classification under 50 U. S. C. 456 (j) specifically exempted him from combatant military training and service. Title 50 U. S. C. § 456 (j), 65 Stat. 83, provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . . Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President . . . "

Since the Government chose to allege that the defendant was classified I-A-O, it should have gone forward a step further and alleged that he refused to submit to induction into the armed forces for assignment to noncombatant service only, pursuant to 50 U. S. C. App. § 456 (j).

The trial judge wrote a very clear and well-reasoned opinion. He referred first to the indictment and quoted it, showing that it alleged that appellee "was classified 1-AO" and refused to perform a duty "to be inducted into the Armed Forces of the United States of America." (R. 7) The trial judge then quoted from 50 U. S. C. App. § 456 (j). (R. 7-8) Here he showed that the Act exempted from combatant training and service one who is classified as was the appellee here. He then states the position of appellee on his motion

perform a duty and there is no duty of a person classified I-A-O to be inducted into the armed forces for unlimited military service. In order to allege properly the imposition of such a duty on the appellee it should have been alleged that the appellee failed to submit to induction or assignment as a noncombatant.

The appellant argues, on page 7 of its brief, that the appellee would have available the writ of habeas corpus in event he was illegally assigned. While this may be true, it is immaterial in considering proper pleading. The judicial remedy of habeas corpus challenged invalid military action against a member of the armed forces in no way lightens the duty imposed upon the Government in respect to compliance with proper rules of pleading.

The Government has alleged that the appellee was a conscientious objector ordered to perform full military training and service. The indictment on its face shows that there was no duty on the part of the appellee to perform full military training and service since he had been classified in I-A-O, as stated in the indictment. This being true, no offense was alleged and it was the duty of the trial court to dismiss the indictment.

CONCLUSION

It is respectfully submitted that the order of the court below, dismissing the indictment, should be affirmed.

Respectfully submitted,

Hayden C. Covington

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Brooklyn 1, New York

Counsel for Appellee

July, 1958

No. 15949

In the
United States Court of Appeals
For the Ninth Circuit

THE GREYHOUND CORPORATION,

Appellant,

VS.

JUANITA JEAN BLAKLEY, a Minor, by Her Guardian Ad Litem, Sidney W. Blakley,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

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THE REPUBLIC PRESS YAKIMA, WASHINGTON

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Exhibit No.	Nature of Exhibit	Identified Page No.	Offered Page No.	Received Page No.	Rejected Page No.
1	Greyhound Lines witness report of accident of Karen Gilbertson	105	106	106	
2	Greyhound Lines witness report of accident of Patti Murphy	138	812	813	
3	Statement of Patricia Murphy	139	142	142	
4	Year Book, Kennewick High School	218	219	219	
5	Copy of G.E. News, 2-15-57	222	223	223	
6	Statement of Elizabeth Greenlee	325	325	325	
7	Electro Chart taken by Dr. Jones	379	379	380	
8	Trip report of Driver, Hamilton	388	389	389	
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18	Withdrawn				

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19	Brain test chart, 2-5-57	566	574	575	
20	Brain test chart, 10-30-57	566	574	575	
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In the
United States Court of Appeals
for the Ninth Circuit

No. 15949

The Greyhound Corporation,
Appellant,
vs.
Juanita Jean Blakley, a Minor, by her Guardian Ad Litem, Sidney W. Blakley,
Appellee.

On Appeal from the United States District Court for the Eastern District of Washington, Southern Division

---

BRIEF OF APPELLANT

JUDGMENT BELOW

The judgment and the verdict upon which the judgment was entered by the District Court are on pages 52 and 45 of the Transcript of Record.

JURISDICTION

The appellee, plaintiff below, is a resident of the State of Washington. The appellant is a corporation of the State of Deleware. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. The jurisdiction of this court is based upon diversity of citizenship, 28 U. S. C. A., Section 1332, June 25, 1948, C. 646 (62 Stat. 930) and the appellate

powers conferred by 28 U. S. C. A., Sections 1291 and 1294, June 25, 1948, C. 646 (62 Stat. 929, 930).

Under the pleadings as amended by the pre-trial order (which provides that the pleadings pass out of the case) appellee brought suit against appellant for damages for personal injuries allegedly sustained while riding as a fare paying passenger on one of the appellant's buses, on the evening of November 20, 1955, and obtained a verdict in the amount of $78,097.50 (R. 45).

QUESTIONS PRESENTED

Juanita Jean Blakley (the appellee) was traveling by Greyhound Bus from Spokane, Washington, to Pullman, Washington, on November 20, 1955, after spending the weekend in Spokane visiting with friends and shopping, returning to her sorority at Washington State College. Shortly after boarding the bus she became ill and at Colfax (61 miles from Spokane, R. 1109) was removed from the bus and taken to a hospital from which she was discharged as cured the following morning, having been diagnosed as having hysteria (R. 969; Ex. 64). She returned to W. S. C. and continued her studies, including modern dancing, in which she got good grades. About six months later a diagnosis was made that she suffered from carbon monoxide poisoning resulting in brain damage and an affliction similar to, if not epilepsy.

The bus in question was what is known as a "Silversides" bus and had a capacity load consisting of 37 pas-

sengers and a driver. It was powered by a diesel engine, not gasoline, which is important in this case. As the bus approached Spangle (18 miles out of Spokane) plaintiff and others noticed fumes in the rear of the bus. The bus driver stopped the bus shortly after the first complaint at Cashup, permitting the plaintiff and others to step out for a few moments of fresh air, went back in the bus and opened up the windows. The four girls riding in the back seat moved forward but the plaintiff was the last one to come forward. The other passengers noticed nothing or satisfied themselves by opening their windows partially. No other passenger had a serious complaint. None developed the symptoms which Miss Blakley purportedly exhibited six months later.

The bus was powered with a General Motors diesel engine; the fuel used by the bus was diesel oil, not gasoline. There is a substantial body of evidence that a diesel engine does not produce carbon monoxide except under adverse conditions, when it produces what might be called less than traces—no significant quantity (R. 912-915). Tests on the same bus (Y515) on which Miss Blakley rode thoroughly established that fact here (R. 1149).

The first issue is whether or not there was sufficient evidence to go to the jury on the question, was there carbon monoxide within the bus which caused Miss Blakley to suffer carbon monoxide poisoning and consequent brain damage. Even if the doctrine of *res ipsa loquitur* applies, the presence of carbon monoxide on

the bus would have to be shown with reasonable probability before the presumption would arise that the presence of an unsafe quantity of carbon monoxide was through the negligence of the appellant.

The second issue is whether under the circumstances of this case the doctrine of *res ipsa loquitur* does in fact apply. The classic example of *res ipsa loquitur* is the imputation of negligence to the owner of a warehouse when a barrel of flour rolls out of an upper story of the warehouse and hits a pedestrian who is walking on the sidewalk in front of the warehouse. In such a case, negligence is presumed and the warehouseman must have shown that the barrel of flour fell without negligence on his part. But it is to be noted that it must be shown that the pedestrian was hit with the barrel of flour. Should the pedestrian wake up on the sidewalk and see no barrel of flour and no one else saw a barrel of flour, the presumption does not go so far as to supply the fact that there was a barrel of flour or the fact that the barrel did hit him on the head. So here, there must be proof of carbon monoxide on the bus in unsafe quantities before the doctrine of *res ipsa loquitur* creates the presumption that such carbon monoxide was present through negligence of the defendant. The presumption cannot put carbon monoxide in the bus any more than it can create the barrel of flour in the classic example cited.

The third question presented is whether or not the trial court erred in withdrawing from the considera-

tion of the jury the question of contributory negligence, assumption of risk and failure to mitigate damages. The evidence was clear that the bus was loaded and that practically all of the individuals on board the bus opened the windows or moved forward and that Miss Blakley after the first notice of fumes (shortly out of Spokane) failed to move forward, failed to go by an open window for over 45 minutes. The evidence is also clear and the plaintiff has admitted that she did not see a doctor for treatment after being discharged from the Colfax hospital for a period of over six months. Had she done so, her purported condition might have been mitigated.

The fourth question relates to the amount of the verdict: it is so excessive as to be unmistakeably the result of passion and prejudice. The plaintiff was, after November 20, 1955, and is, able to work, get married and enjoy life. For example (all subsequent to November 20, 1955), after completion of her first year in college, she worked for about a year at General Electric in Richland. She left her work in September, 1957, shortly before she expected this case to come to trial. The recorded interview of September 27, 1957, concerning her termination of employment, with Z. D. Wood, employment manager for General Electric at Richland, states "Will attend legal proceedings involving personal injury, later to be married and move from area." In Mr. Wood's own handwriting, "Has a civil suit pending. When this is settled, she will be married

and leave this area. Enjoyed work very much." (Ex. 56, R. 861).

STATEMENT OF THE CASE

Juanita Jean Blakley, a young lady attending Washington State College, was enrolled as a Freshman and was pledged to Chi Omega Sorority. During the week immediately preceding November 20, 1955, Juanita Blakley had called her mother and requested to have permission to attend the University of Washington-W.S.C. football game at Seattle that weekend. Her mother refused her permission and instead of going to Seattle the plaintiff spent the weekend in Spokane with some friends. She went with Karen Gilbertson from her Sorority but did not stay overnight with that girl, going elsewhere, joining her friend just before the time to take the bus back to Pullman, Sunday evening, November 20, 1955 (R. 75). The bus in question had been assigned to the route from Spokane to Lewiston, Idaho, and return via Cashup, Colfax, and Pullman. The trip in from Lewiston to Spokane was uneventful and although the bus was loaded there were no complaints (R. 1088). At the appointed time, approximately 6:00 p.m., the bus loaded at the Spokane terminal but did not leave for approximately an hour, awaiting students who were coming from Seattle who had attended the game (R. 1089). The connecting bus was approximately one hour late. After these additional students had

boarded the bus, the bus left Spokane, with the plaintiff and her friends in the rear seat (R. 76). At the outskirts of Spokane the girls in the rear seat stated they noticed fumes (R. 77). One of the girls came forward, talked to the driver stating that the rear of the bus was hazy; but this was not until the bus reached Cashup almost an hour out of Spokane (R. 1109), where the highway on which the bus was driving was a very narrow two-lane highway with deep ditches on either side. The driver proceeded to the nearest cross road which was Cashup and pulled off of the highway (R. 1111). He let two or three of the girls out of the bus to stand on the shoulder while he checked the bus. Since a few of the other passengers also noticed fumes he opened up the windows and asked the girls to sit down front (R. 1111). Instead of sitting there they returned to the back of the bus but a short time later came forward, one of the passengers giving the plaintiff her seat (R. 78). Shortly thereafter, the plaintiff began gasping and throwing herself about (R. 80). One of the witnesses described her actions as hysterical (R. 1175). The bus driver arranged to take her to the Colfax hospital. Dr. William Freeman examined her upon arrival, put her to bed, diagnosing her condition as hysteria (R. 969). She checked out of the hospital the next day and made her way to the W. S. C. campus. The doctor's report showed that he had ruled out carbon monoxide poisoning and showed that her entering and her final diagnosis was hysteria (R. 969). The doctor had interned

at Cook County Hospital, Chicago, and was very familiar with carbon monoxide poisoning, having observed many cases there. Neither her breathing nor her complexion nor her reflexes which are three universal characteristics of CO poisoning indicated to the doctor that there was carbon monoxide poisoning.

The girl went back to her classes and continued on with normal work. In fact her actual grade record which is in evidence indicates that her grades improved rather than went downhill. Likewise, she continued studying modern dance, actively participating in sorority affairs, having many dates as she was and is a very attractive girl. During the trial one of the plaintiff's doctors demonstrated one of the effects of carbon monoxide was the loss of the reflex action of her knee. Her knee was tapped just below the kneecap. With a normal person there is an immediate and familiar reaction. In her instance there was no reaction. Plaintiff's doctor stated that this was one of the evidences of carbon monoxide poisoning. However, the medical history of the girl and an examination which was made of her at the time of her entry into Pullman prior to the ride on the bus November 20, 1955, disclosed that the doctor making the examination noticed that she had hyporeflexia. That is, lack of reflex action. Whatever it was that caused the lack of reflexes, whether it was carbon monoxide or some other cause, that cause occurred long before the ride on November 20, 1955 (R. 836-837).

Along in December, and during the Christmas vacation, the plaintiff's father endeavored to have the Greyhound Company pay the hospital bill at Colfax, and had Miss Blakley examined by a local doctor, but not for treatment (R. 1131). This doctor found nothing wrong with her; and it is interesting to note that her going to this doctor was at the request of her attorney, rather than upon the advice of any person or because the family felt in need of medical attention (R. 1131). Her lawyer then had her see a psychiatrist in Spokane, Dr. Southcombe. This doctor examined her on two or three occasions and referred her to Dr. Jones whereupon she was given an electroencephalograph. In June of 1956 approximately nine months after the bus ride in question, the doctor diagnosed her condition as being an epileptic process due to carbon monoxide poisoning. He subsequently prescribed thereafter several medicines which according to the plaintiff's mother have had a quieting effect upon the plaintiff and have controlled her "episodes."

The court submitted the case to the jury, denying the defense motions and a verdict was returned against the defendant in the sum of $78,097.50 (R. 45). Thereafter, defendant filed a motion for judgment notwithstanding the verdict of the jury or in the alternative for a new trial. Both motions were denied and judgment was entered (R. 52).

SPECIFICATIONS OF ERRORS RELIED UPON IN THIS APPEAL

1.

The District Court erred in failing to grant appellant's motion challenging the sufficiency of the evidence and for dismissal at the close of appellee's case upon the ground and for the reason there was no evidence that the defendant negligently permitted any unsafe quantities of carbon monoxide to be present in the bus.

2.

The District Court erred in failing to grant appellant's motion at the close of all the evidence for the same reason as assigned in specification No. 1; and in failing to give appellant's proposed instruction No. 1 (R. 25):

> "You are instructed to return a verdict in favor of the defendant. In the event the foregoing instruction is denied, the defendant requests the following instructions."

3.

The District Court erred in failing to grant appellant's motion for judgment notwithstanding the verdict for the same reason as stated in specification No. 1.

4.

The District Court erred in submitting the issue of *res ipsa loquitur* to the jury upon the ground and for the reason that the appellee failed to introduce evidence sufficient to raise the presumption in question. Until there was evidence of quantities of carbon monoxide

sufficient to be a hazard to health in the bus, then there was no basis for any presumption that the presence of such gas in such quantities was caused by the negligence of appellant.

5.

The District Court erred in instructing the jury that the issues of contributory negligence, assumption of risk and mitigation of damages were withdrawn from their consideration (R. 1421, 1437), and further erred in failing to give defendant's proposed instructions Nos. 14, 15, 16, and 17 which read as follows (R. 35, et seq.):

"Instruction No. 14

'Contributory Negligence' is negligence on the part of the person injured which materially and proximately contributes to his injury. It may consist in doing some act which an ordinarily careful and prudent person would not have done under the same circumstances, or in failing to do something which a reasonably prudent person would have done under the same circumstances. If plaintiff was guilty of contributory negligence, she cannot recover, even though the defendant was guilty of negligence.

"The burden of proving contributory negligence rests upon the defendant.

"A paying passenger is required to use only that degree of care and prudence which a person of ordinary intelligence, care and prudence would exercise under the same circumstances."

"Instruction No. 15

You are instructed that plaintiff is not entitled to recover any damages in this case unless the plain-

tiff was free of any negligence on her part which proximately contributed to cause the alleged injuries of which she complains, if any. That is, you must find in order to authorize a recovery for the plaintiff that plaintiff was free of any failure to exercise due care for her own safety while in the bus, for our law requires that every person exercise reasonable care for his or her own safety where such failure to exercise such care proximately contributes to cause the accident.

"You are, therefore, instructed, that if you find in this case from a predonderance of the evidence that the plaintiff, Juanita Jean Blakley, was herself guilty of some negligence which materially and proximately contributed to cause her injuries, if any, then you are instructed that as a matter of law she cannot recover in this case and your verdict must be for the defendant whether or not you may also find that the defendant or its agents or employees are negligent.

"*Conradi vs. Arnold,* 34 Wn. (2d) 730."

"Instruction No. 16

You are instructed that a person in the position of Juanita Jean Blakley in this case did not have an absolute and unqualified right under all the circumstances to assume that the conditions in the bus were reasonably safe. She was bound to look out for her own safety and in so doing was required to use that degree of care which a reasonably prudent person of ordinary intelligence would use under the same or similar circumstances and if there were any obvious dangers it was her duty to take reasonable measures to avoid them.

"So, in this case, if you find that Juanita Jean Blakley failed to look out for her own safety, that is, failed to use that degree of care which a reasonably prudent and an ordinary and intelligent person would use under the same circumstances in which she found herself and such failure proxi-

mately contributed to the alleged injuries of which she complains, then you are instructed that she cannot recover in this action and your verdict must be for the defendant.

"*Smith vs. Mannings, Inc.*, 13 Wn. (2d) 573."

"Instruction No. 17

When one voluntarily and willingly places himself in a position of danger, he is presumed to assume all the risks reasonably to be apprehended. Thus, if the plaintiff in the exercise of ordinary care, knew or should have reasonably apprehended the risk of being exposed to carbon monoxide poisoning, if any, then if she failed to take ordinary or reasonable steps to protect herself, then you are instructed that she in law has assumed the risks inherent in the situation and your verdict should then be in favor of the defendants. No one in law is permitted to recover from another when with his own knowledge he assumes and subjects himself to a known risk."

(Exceptions stated R. 1456) upon the ground and for the reason that the jury could have found that the appellee had failed to exercise ordinary care to protect herself as others in the bus did and in remaining seated after the fumes were apparent to her, and in failing to take proper and prompt care of herself after the purported injury.

6.

The District Court erred in submitting to the jury the question of the driver's negligence inasmuch as the driver's negligence was not claimed in the pre-trial order and no amendment to that effect of the pre-trial order was had. Further, upon the ground that there was no evidence nor reasonable inference from the evi-

dence to establish that the bus driver was guilty of negligence (R. 1442) (Exception R. 1457).

7.

The District Court erred in failing to grant a new trial upon the grounds of excessive damages given under the influence of passion and prejudice upon the ground and for the reason that the evidence that the appellee was working up to a period shortly before the trial was not contradicted, and upon the evidence that her separation from such employment was not due to any medical history, and upon the evidence that those living with her found her to be a normal person, all of which evidence was not contradicted directly, the verdict appearing to be based largely upon the fact that the plaintiff was an extremely attractive person, fell in the courtroom several times (without hurting herself) together with a vivid presentation in the courtroom of the loss of reflexes, which condition, as stated above, existed prior to the bus ride in question.

SUMMARY OF ARGUMENT

The evidence of the appellee failed to establish dangerous or hazardous quantities of carbon monoxide in the bus at the time in question. The sole and uncontradicted evidence was to the effect that any person can stand an exposure of from 400 to 500 parts per million of carbon monoxide for over an hour without any after effects (R. 887, 916) (Ex. 63). This evidence is not re-

futed. The evidence of appellant established that there was less than ten parts per million of carbon monoxide which appellee's doctors admitted could do no harm (R. 1148-1149). The only witness for the plaintiff, a Mr. West, testified that one foot from the exhaust pipe in the direct blast of the exhaust there was only 266 parts per million, well within the tolerance above specified (R. 462). Therefore, according to the uncontradicted testimony on both sides, plaintiff had not been exposed for a sufficiently long time to have resulted in any after effects, dangerous or otherwise. The verdict of the jury was thus wholly inconsistent with this evidence. Therefore, defendant's motion at the close of plaintiff's case, defendant's motion at the close of all the evidence and the defendant's motion for judgment N. O. V. should have been granted.

The court found that the doctrine of *res ipsa loquitur* applied and permitted the case to go to the jury upon that theory, when in truth and in fact said theory was not applicable in such a case as the case at bar. There was no evidence by the plaintiff of carbon monoxide in the bus. Therefore, there was no basis for the existence of the presumption of negligence in permitting carbon monoxide to be in the bus in the absence of evidence that there was carbon monoxide in the bus.

Error in law occurred in instructing the jury that the issues of contributory negligence, assumption of risk, and failure to mitigate damages were withdrawn

from the jury, and similarly, the court's failure to give defendant's proposed instructions Nos. 14, 15, 16, and 17 upon the ground and for the reason that the jury could have found that the plaintiff had failed to exercise ordinary care to protect herself as others in the bus did and in remaining seated after the fumes were apparent to her as her own witnesses testified. These issues were removed from the consideration of the jury over appellant's objection. Certainly, appellant was entitled to have these issues considered by the jury. There was evidence concerning same.

There was no contention in the pre-trial order that the driver of the bus was guilty of negligence. There was no testimony throughout the plaintiff's case in chief directed toward any negligence on the part of the bus driver. In fact, Mr. Wheaton, one of plaintiff's principal witnesses, testified that the bus driver did everything that he could do. Mr. Wheaton had been qualified as an expert on buses. There was simply no evidence of anything that the bus driver did or did not do which would constitute negligence. He stopped as promptly as he could after a complaint of fumes, and provided ambulance and hospital service as soon as possible out of an over abundance of caution. It should be borne in mind that the other passengers complained of the delay, rather than the fumes.

Finally the verdict was so large as to be unmistakably the result of passion and prejudice.

ARGUMENT

I.

FAILURE OF PROOF

We wish to discuss first the problem pertaining to the failure of proof with respect to carbon monoxide. We will discuss here specifications of error Nos. 1, 2 and 3.

It was the contention of the appellee as stated in the pre-trial order that while riding on the bus of appellant from Spokane to Colfax she was exposed to carbon monoxide, received a dangerous amount thereof, resulting in the destruction of brain cells causing an epileptic condition (R. 11).

Let us detail here the circumstances: Miss Blakley, on November 20, 1955, was a girl 18 years of age, graduated the preceding June from high school with honors, attaining membership in National Thespian Honorary, active and popular in her school.

Juanita entered Washington State College that fall, pledging the Chi Omega sorority where she was a very popular girl. As many students do upon entering college, she had some difficulty with her grades during the first semester, but upon better adjustment her grades improved somewhat, but certainly did not lessen during the second semester (Ex. 79). On November 19, 1956, the University of Washington was playing Washington State College at football in the stadium at

Seattle. Juanita called her mother and asked for permission to go to this game. Her mother asked her not to go. Instead, she left Pullman Friday after school, traveling with her friend, Karen Gilbertson, to Spokane. Upon arrival in Spokane she stayed at the home of her sorority sister for a few hours, then met some other friends and stayed at their home over the weekend, meeting her sorority sister shortly before time to depart on the bus back to Pullman (R. 75). Although the bus was on time that night it was delayed an hour in Spokane to meet the incoming bus from Seattle, carrying other students who had gone to attend the game. The bus was fully loaded as it departed for Pullman with its ultimate destination Lewiston, Idaho. Within a few miles after leaving the depot, some of the passengers (R. 77, 117) noticed fumes in the bus, but did not tell the driver until the bus was approaching Cashup, a short distance from Colfax, about an hour later, when one of the girls sitting in the rear of the bus went forward to the driver and told him that there were fumes in the rear of the bus (R. 1092, 100). The highway was a narrow highway with no turnouts and as the law of the State of Washington prohibits parking on the travel portion of the highway, the bus driver drove a short distance (two or three minutes) to the cross roads known as Cashup (R. 1093). Pulling off the highway as far as he could he permitted some of the girls to get out of the bus, the plaintiff being one of them (R. 1094). He then checked the bus, noticed that there were

some fumes in the bus, but they were so dilute he could not see them, opened some of the windows, and suggested that the girls stay forward in the bus. The girls however returned to the rear of the bus, but shortly thereafter two of them came forward and finally the plaintiff came forward (R. 120). The girls had been smoking in the rear of the bus, and noticing that Miss Blakley seemed to be somewhat overcome, one of the passengers near the front permitted her to take a seat. Actually the fumes were so light several of the passengers riding in the rear of the bus failed to observe anything whatsoever. For example, Mr. James Whitman testified (R. 1167):

"Q. Mr. Whitman, were you on this bus that left Spokane on the night of November 20, 1955?

A. Yes, I was.***

Q. Where did you sit in the bus?

A. In the rear.***

Q. You were traveling alone. Did you see any fumes in the bus?

A. No, I did not.

Q. I beg your pardon?

A. I did not.***

Q. I see. Did you smell any fumes in the bus, Mr. Whitman?

A. No.

Q. Did you hear the girls in the back seat complain or talk about fumes?

A. Yes.***

Q. Well, what did they do and what did they say?

A. They giggled a good deal and complained about the fumes, held handkerchiefs to their nose eventually, and what not.*** I looked about me, I didn't detect any fumes.

Q. Did the fumes there have any effect on you?

A. None whatsoever.

Q. Were they irritating to your eyes?

A. No (1410).

Q. To your nose?

A. No.

Q. Did they give you a stomach ache or nausea?

A. No, they didn't."

The witnesses for the plaintiff testified at the trial that the fumes in the bus were noticeable at the outskirts of Spokane. Nothing was done by any of them for about an hour (R. 1092-3). One of the principal witnesses for the plaintiff was Patricia Murphy. She testified (R. 117):

"Q. Did you observe anything on the trip, while you were riding—what experience did you have?

A. Well, I smelled the gas fumes and became nauseated."

"Q. When did you first smell those, Miss Murphy?

A. I first noticed them around the city limits of Spokane.

Q. Where?

A. Around the city limits of Spokane.

Q. What did you do about it?

A. I just sat there.

Q. How long did you sit there?

A. Oh, for 25 minutes, around there.***

Q. Did you stop at Rosalia?

A. Yes; we did.

Q. Had Karen and Jean gone up to the front up to the time you stopped at Rosalia?

A. No; I don't believe they had.

Q. What did you do at Rosalia?

A. We got out of the bus.

Q. Then what did you do?

A. We got back in the bus.

Q. Well, you remained there for a few minutes, did you?

A. Yes.

Q. At that time, where did you continue to (96) sit?

A. I stayed in the front of the bus.

Q. Where did the girls go?

A. They went to the back."

Another witness, Mrs. Howard Engle, who was also a passenger on the bus in question testified (R. 1175 et seq):

"Q. Do you recall whether or not there were any fumes, gas fumes, in the bus?

A. I didn't notice any.

Q. Did you hear that other girls were complaining about the gas fumes?

A. Yes.

Q. Did those girls, when they got back on, sit opposite you on the bus?

A. The first time we stopped, they didn't. The second time we stopped, Miss Blakley sat in the opposite—in the seat across the aisle next to the window.***

A. She apparently was having a bit of difficulty breathing. I felt that it was more hysteria.

Mr. Tonkoff: I move that that be stricken.

The Court: Yes, that will be stricken and the jury instructed to disregard it, the opinion."

It is apparent from the foregoing that the fumes were not particularly dense in the bus because when the bus stopped only three of the girls got off and these were the three in the rear of the bus. Other passengers did not feel that the fumes were sufficiently bad to get out of the bus. Likewise, none of the other girls had any residual effects. Some of the passengers did not even notice the fumes. The appellee, Miss Blakley, of course, became ill on the bus. Upon arrival at Colfax, approximately an hour and fifteen minutes after leaving Spokane, the bus driver pulled up at the fire station where he knew there was an ambulance and had Miss Blakley taken to the hospital out of an abundance of caution. She was examined there by Dr. William Freeman, who had practiced in Colfax for a period of twelve years, and was licensed to practice in the States of Washington, Idaho and Minnesota. He had graduated from Rush Medical College, Chicago, interning at Cook County Hospital, Chicago, where he had had consider-

able experience with carbon monoxide poisoning. He testified as follows (R. 966 et seq):

"A. Well, as I recall, they said that she had been overcome with gas fumes from the bus.

Q. Did you then treat her?

A. Yes, I did.***

Q. Doctor, did you diagnose her condition?

A. Yes, I did.

Q. What was your diagnosis?

A. Well, the tentative diagnosis when she came in the hospital was hysteria, and we kept in mind—we usually put to rule out carbon monoxide poisoning, so we keep it in mind. The working diagnosis was the same as the tentative diagnosis, and the final diagnosis was put down on discharge as hysteria.***

Q. (By Mr. Hawkins): Doctor, outside of this part that has been deleted, is that the hospital record that was made at the time Jeannie Blakley was in the hospital?

A. Yes.

Q. Is that your handwriting? I notice your signature at the bottom.

A. Yes.

Q. And the tentative diagnosis is what?

A. Hysteria and 'R.O'—that means rule out—'CO,' carbon monoxide poisoning.

Q. And at the bottom or final diagnosis?

A. Hysteria.

Q. Doctor, I believe you said you were at Cook County Hospital?

A. Yes.

Q. Did you have any experience in carbon monoxide while you were at Cook County?

A. Yes, quite a bit of experience."

The following morning Miss Blakley was discharged as cured and returned to her college work. It was not until some time afterwards that the symptoms appeared upon which she bases her claim for the damages that were returned by the jury in this case.

One of appellee's witnesses and a sorority sister, Rita Anderson by name, testified as follows (R. 150):

"Q. After this incident in November, 1955, can you tell the members of the jury here her general condition and her health as you observed it?

A. Well, not right afterwards. But—oh, say, a few weeks or a month later she started having headaches***."

Her condition certainly must have been mild as she was never taken to the infirmary nor was a doctor ever called to the sorority (R. 160):

"Q. Did you report her condition to the infirmary?

A. I did not.

Q. Is there an infirmary at WSC?

A. Yes, sir.

Q. It is a little hospital, is it not?

A. That is right.

Q. There is a doctor, there?

A. Yes, sir.

Q. And there are nurses there?

A. Yes, sir.

Q. The purpose of that infirmary is that if anybody gets sick, they are taken to the infirmary, are they not?

A. Yes, sir.

Q. Girls from your house have been taken to the infirmary, have they not?

A. Yes, sir.

Q. Do you know whether Jean was ever taken to the infirmary—Juanita Blakley, the plaintiff in this case? (148)

A. Not to my knowledge.

Q. You were very close to her, you testified?

A. Yes, sir.***

Q. You studied together?

A. We did.

Q. You went out on dates together?

A. We did.

Q. Do you know whether she was in the hospital or not?

A. No, sir; I don't.

Q. Don't you think that if she had been in the hospital you would know about it?

A. Yes.

Q. As I understand your testimony on direct, immediately following November 20th, you didn't notice anything particularly different about Juanita?

A. No.

Q. I think you testified it wasn't until May you first (149) noticed that something was wrong?

A. No, sir. I said she didn't faint until May.***

Q. Did you tell her to go and see a doctor?

A. No, sir.

Q. Did you report it to the house mother?

A. No, sir.

Q. Did you take her to the infirmary whenever she had any of these terrible headaches?

A. No, sir."

After leaving the Colfax hospital on November 21, 1955, the appellee did not again see a doctor until she was home during the Christmas holidays of 1955. But this was at her lawyer's request, and not for treatment. She was examined by Dr. Jack D. Freund, who testified as follows (R. 1131 et seq):

"A. I saw Juanita or Jean Blakley once. (1366)

Q. And when was that, Doctor?

A. It was December the 28th, 1955.

Q. December 28th, 1955?

A. Yes.

Q. What was the reason that she came to see you, do you know?

A. I examined her at the request of an attorney.

Q. Who was the attorney?

A. John Westland.

Q. And were you told to look for any specific thing, Doctor?

A. I was told that she had been in a bus and they were suspicious of carbon monoxide poisoning.***

Q. What did your examination reveal to you, Doctor? (1367)

A. The only thing that I found deviating from the normal, that the reflexes of her lower legs, the patella, the knee reflexes, I felt were a little weaker than normal.

Q. Did she have any trouble with her balance, Doctor, when she walked?

A. Her gait was normal.

Q. Did she have any trouble with her speech? Was she hesitant at all?

A. I didn't notice any, and in my conversation with her she answered all the questions and told the story.

Q. Did she tell you the story about the ride on the bus?

A. Yes.***

Q. All right. Did you prescribe anything for her, Dr. Freund?

A. No, I was only to examine her, not treat her.***

Q. Doctor, just one question. Did you find or make a diagnosis of carbon monoxide poisoning?

A. No, I didn't.

Q. Did you report that to Mr. Westland?

A. I reported that my findings were normal."

Miss Blakley, the appellee, did not see another doctor until she saw Dr. Robert H. Southcombe of Spokane, Washington, a psychiatrist. Miss Blakley did not go to him until the 7th day of May, 1956, in his office in Spokane. Dr. Southcombe testified (R. 708):

"Q. In order to make a diagnosis of carbon monoxide poisoning, wouldn't it be important to know whether or not there was any appreciable concentration of carbon monoxide in the bus?***

A. That is true. But the responsibility of a physician—when a patient comes to him and gives a history, if he is going to go out and check every little detail, there is going to be very little work done in the doctor's office. (853)

Q. How about checking with the doctor who has treated the patient?

A. The patient wasn't referred to me by any physician.

Q. Your first contact was by Mr. Westland?

A. This patient was referred to me by Mr. Westland.***

Q. You have diagnosed this case to be a case of petit mal caused by acute carbon monoxide poisoning, have you not?

A. I again refer to the fact that my diagnosis was an organic encephalopathy manifesting itself clinically by petit mal attacks.

Q. Caused by carbon monoxide poisoning?

A. That is right.

Q. The reason you attribute it to carbon monoxide poisoning is because of the history—that is, the story—that you got from the mother and from the daughter, (851) that she had been riding on this bus?

A. That is correct.***

Q. Do you know what the carbon monoxide content of Diesel exhaust is?

A. No, sir; I don't."

The foregoing, we submit, is a summary of the essential evidence upon which the appellee's case rested below.

The entire basis of appellee's case thus is that since a doctor six months later diagnosed her case as being

petit mal epilepsy caused by carbon monoxide poisoning and since there were fumes in the bus that therefore appellant was guilty of negligence in permitting excessive quantities of CO to be in the atmosphere of the bus during the ride in question. This is a non sequitur. Notwithstanding the fact that no other passenger suffered any such effects, notwithstanding that there was no evidence of carbon monoxide gas on the bus, notwithstanding the fact that the fumes were not sufficiently bad to drive the passengers off the bus, and in several instances so thin and unnoticeable that several on the bus were not even able to detect the presence of such fumes, yet the jury was permitted to hold the appellant responsible.

It is to be borne in mind that the bus in question was powered by a General Motors diesel engine. It is to be borne in mind that a diesel engine emits only minor insignificant traces of carbon monoxide gas. It is to be borne in mind that a diesel engine does not put out 5 to 10% carbon monoxide as does a gasoline engine, but only insignificant traces. Virtually every day in the newspapers there are stories of people sitting in a parked automobile with the engine running, becoming asphyxiated, overcome, and in some instances killed by carbon monoxide gas. What evidence is there in the record that Miss Blakley did not receive a dangerous exposure at some other time or some other place and from some other source? If in fact she had CO poisoning.

Diesel engines have universally been used in mines and in submarines (until the advent of atomic power) strictly for the reason that the diesel engine does not generate dangerous quantities of carbon monoxide gas. Appellee's experts always assumed over 500 parts per million of carbon monoxide gas in the air of the bus. There was never any evidence of such quantity. The experts for the appellant uniformly established that there was less than ten parts per million of carbon monoxide in the bus, even with the back seat off, the plate to the engine compartment removed, and the seal broken, and with the exhaust manifold gasket partially removed (R. 1149). As a matter of fact, as the record shows, several runs were made with this particular bus and with similar buses under conditions far more extreme than existed on the bus in question on November 20, 1955 (R. 1095). These tests uniformly showed that there was less than 10 parts per million of carbon monoxide with the exhaust manifold gasket removed, the plate and seal and seat removed from the bus and the testing device just a few inches from the exhaust manifold itself (R. 898, 901) (Exs. 65, 66 and 74).

It is therefore apparent that the case against appellant upon the proposition of negligence and causation is based entirely upon assumption and is entirely unsupported by any substantial evidence in the case.

Although, as is shown by the testimony of Dr. Southcombe quoted above, Miss Blakley's condition may be

described as petit mal, the conclusion that her "condition" was "caused" by carbon monoxide is as the Doctor states, based upon heresay, namely the history given by the mother and the lawyer. The bare fact that an injury has happened cannot of itself justify an inference that the injury was caused by the defendant. This principle is well established in *Pacific Coast R. Co. vs. American Mail Line*, 172 Pac. (2d) 226, 25 Wn. (2d) 809. In that case the court stated, page 817:

> "Generally speaking, the mere fact that an injury has been sustained does not of itself, apart from the causative factors, create a presumption of negligence. *Anderson v. Harrison*, 4 Wn. (2d) 265, 103 P. (2d) 320."

See also *Prentice vs. United Pacific Insurance Company*, 106 P. (2d) 314, 5 Wn. (2d) 144, where the court said, pps. 163 and 164:

> " " ' "Proof which goes no further than to show an injury could have occurred in an alleged way, does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause."
>
> " " '***As a theory of causation, a conjecture is simply an explanation consistent *with known facts or conditions*, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only.***' " "

It is a case of indulging in a presumption in order to support a conjecture. Presumptions may not be pyramided upon presumptions, nor inference upon infer-

ence. *Johnson v. Western Express Co.*, 107 Wash. 339, 181 Pac. 693; *Mumma v. Brewster*, 174 Wash. 112, 24 P. (2d) 438.

> " "We will infer a consequence from an established circumstance. We will not infer a circumstance when no more than a possibility is shown." " *Parmelee v. Chicago, M. & St. P. R. Co.*, 92 Wash. 185, 194, 158 Pac. 977, 981."

See also *Home Insurance Company vs. Northern Pacific Railway Company*, 18 Wn. (2d) 798, 140 P. (2d) 507, at page 803:

> "The appellant contends that, as babbit bearings are more likely to wear and become hot than roller bearings and, hence, create a greater hazard, and since the fire originated in the boot, the overheating of the bearings must have been the cause of the fire. It seems to us, however, that what was said by this court in the *Prentice case, supra*, p. 162, is applicable here:"

See also *Gardner vs. Seymour*, 27 Wn. (2d) 802, 180 P. 564, where the Supreme Court of the State of Washington stated, page 810:

> "***It is not sufficient that they be consistent merely with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well settled rule.' It seems to us that we may reasonably draw other conclusions as to the cause of this injury from the facts in evidence than those contended for by the plaintiff."

To the same effect is *Johanson vs. King County*, 7 Wn. (2d) 111, 109 P. (2d) 307, and *Dobbin vs. Pacific Coast Coal Company*, 25 Wn. (2d) 190, 70 P. (2d) 642.

The jury had the right to find that on May 7, 1956, from the testimony of Dr. Southcombe, the plaintiff was afflicted with petit mal, but there was no evidence upon which to base a finding that there was any carbon monoxide of dangerous quantities or in any quantity in any way injurious in the bus. Not being able to make that finding, then obviously, there could be no finding that the appellant negligently permitted a dangerous quantity of carbon monoxide in the bus. Defendant's challenge to the sufficiency of the evidence and its motion for non-suit and dismissal at the close of plaintiff's case, and the defendant's motion at the end of all of the testimony and defendant's motion for judgment notwithstanding the verdict, or either of them, should therefore have been granted.

II.

RES IPSA LOQUITUR

Under this heading are discussed specifications of error Nos. 1, 2, 3 and 4. The trial court submitted the case to the jury on the theory of *Res Ipsa Loquitur* (R. 820). It is the appellant's theory that the facts of this case do not give rise to the presumption of negligence under the doctrine of *Res Ipsa Loquitur.* This presumption is discussed at considerable length in the case of *Pacific Coast R. R. Co. vs. American Mail Line*, 172 P. (2d) 226, 25 Wn. (2d) 809. In that case the defendant's boat struck a scow which was tied to a dock,

crushing the dock. In refusing to apply the doctrine of *Res Ipsa Loquitur,* the Supreme Court of the State of Washington stated, page 819:

> "In the case of *McClellan v. Schwartz,* 97 Wash. 417, 166 Pac. 783, this court, speaking through Chadwick, J., considered at some length the application of the doctrine of *res ipsa loquitur* to an action for personal injury brought by one who was injured on the business premises of the defendant. The court said:
>
> 'Because of the circumstantial character of the testimony, the doctrine is applied sparingly. *Anderson v. McCarthy Dry Goods Co., supra.* Hence it has been held that one charged under the doctrine of *res ipsa loquitur* is not to be put to his proof unless there is some *showing* of *cause*—careless construction, lack of inspection, or misuser. The cause of the accident—*the offending instrumentality*—must be identified before one charged is put to answer."

In other words, applied to the facts here, the offending instrumentality, to-wit, carbon monoxide, must be shown to have been on the bus before the doctrine of *Res Ipsa Loquitur* applies.

The court there continues, Page 819:

> "***The court held, just as it was held in *Cole v. Spokane Gas & Fuel Co.,* 66 Wash. 393, 119 Pac. 831, that it is a *showing of facts* sufficient to sustain a presumption of negligence, and not the *fact of injury,* that *sets the doctrine in motion.****"
>
> " " 'There can be no recovery on the ground of *res ipsa loquitur,* where there was nothing to show what caused the iron to slip and no proof of negligence; since it was necessary for plaintiff to show that it was caused by defective machinery or some extraordinary or negligent act under the control of the defendant.' " "

No one testified either on behalf of appellee or appellant's witnesses that any of the trifling things found wrong with the bus, the torn panel, the loose outside access panel to the motor at the rear of the bus, or anything else caused dangerous quantities of carbon monoxide to get into the bus.

In this connection an interesting case is *Wellons vs. Wiley*, 24 Wn. (2d) 543, 166 Pac. (2d) 852. There the Supreme Court of the State of Washington quoted with approval the following language of the Supreme Court of Wisconsin, page 550:

> "The court held that the burden rested upon the plaintiff affirmatively to prove negligence, and that:
>
> 'While the inferences allowed by the rule or doctrine of *res ipsa loquitur* constitute such proof, it is only where the circumstances leave no room for a different presumption that the maxim applies. When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails and it cannot be invoked. *Quass v. Milwaukee G. L. (Gaslight) Co.*, 168 Wis. 575, 170 N. W. 942.' "

If the condition of "petit mal" is connected with the ride in the bus only by conjecture, and not by reasonable inference from the facts and circumstances, then the doctrine of *res ipsa loquitur* is not applicable and the appellee should not recover. Such is the case here. See *Hufferd vs. Sisovitch*, 290 P. (2d) 709, 47 Wn. (2d) 905, where the court stated, page 908:

> "Negligence is not to be assumed from the fact that there was a fire. Negligence causing a fire

> must be established by direct evidence or by a legitimate inference from the established facts and circumstances, *i. e.*, circumstantial evidence. *Cambro Co. v. Snook* (1953) 43 Wn. (2d) 609, 262 P. (2d) 767.
>
> "To determine whether the doctrine of *res ipsa loquitur* is applicable, the trier of the facts must recognize a distinction between what is mere conjecture and what is reasonable inference from the facts and circumstances. *Home Ins. Co. v. Northern Pac. R. Co.* (1943), 18 Wn. 798, 140 P. (2d) 507, 147 A.L.R. 849; *Cambro Co. v. Snook, supra.*"

As pointed out by the principles of the cases cited above, it is not incumbent upon the appellant (assuming the jury accepted the testimony of Dr. Southcombe that six months later he found that the plaintiff suffered petit mal from carbon monoxide poisoning) to assume the burden of proving that appellee was exposed to carbon monoxide at some other time, such as while parking at night in a car with the motor running, as the District Court ruled (R. 816). Rather the burden is upon the appellee to establish that there was carbon monoxide in dangerous quantities in the atmosphere of the bus. It is an essential link in the chain of appellee's argument. Had there been proof of this, then there would be some basis for the application of the doctrine of *res ipsa loquitur.*

In the absence of proof of that fact, the doctrine does not apply just as in the case of the barrel of flour falling out the second story window of the warehouse. If there is no barrel of flour, there is no room for the application of the doctrine of *res ipsa loquitur.*

The court therefore erred in submitting to the jury the issue of res ipsa loquitur and erred in failing to grant the defendant's motion at the close of the plaintiff's case.

III.

THE QUESTION OF CONTRIBUTORY NEGLIGENCE, ASSUMPTION OF RISK AND MITIGATION OF DAMAGES

Under this heading we will discuss specifications of error No. 5. The pleadings and pre-trial order which supplanted the pleadings in this case raised the issues of contributory negligence, assumption of risk and mitigation of damages. At the close of the case, the appellee moved to withdraw these three issues from the jury. This motion was granted over objection of appellant and specific instructions were given by the court, specifically withdrawing these issues from the consideration of the jury. The court also refused to give appellant's proposed instruction on these issues (R. 1456).

It is the position of appellant that the withdrawal of any one of these issues constituted prejudicial error. Concerning mitigation of damages, it is a rather startling fact, but nevertheless true, that it was almost ten months after the bus ride in question before the plaintiff received any treatment for her alleged injuries (R. 666, 691, 696). Her first visit to Dr. Freund, as he

stated, was not for the purpose of treatment, but for examination (R. 1133). Again, her trip to see Dr. Southcombe in Spokane in May, 1956, was not for the purpose of treatment, but for examination at the request of the attorney (R. 708). This examination was originally for the purpose of trying to compel appellant to pay the Colfax Hospital bill, which the appellant had previously declined to do on the basis that something other than the ride on the bus was the cause of the plaintiff's trouble since no one else on the bus had to be taken to a hospital or suffered any consequences.

It was after Dr. Southcombe had examined her the second time that he decided that treatment was in order. In this connection the Doctor stated (R. 694 et seq):

"Q. Doctor, would you go over again the drugs you prescribed for Miss Blakley?

A. Yes, sir; I first prescribed Mysoline. (837)

Q. What does that do?

A. Mysoline is an anti-convulsant drug.***

A. I certainly would feel derelict if I had a patient who had a convulsant electro-encephalogram and I didn't prescribe it.

Q. You prescribed it for what reason?

A. I prescribed it to reduce the irritability of the cerebral cortex.***

Q. What was the other drug that you prescribed?

A. Phenobarbital.

Q. That is an anti-convulsant?

A. That is an anti-convulsant. As a matter of fact, it is one of the early and best-known anti-convulsants.***

Q. When did you prescribe that?

A. I think I prescribed that sometime after June, 1956.***

Q. You saw Miss Blakley in May, 1956; and you saw her again in June, 1956. When did you see her again after that?

A. I saw her in November, '56.

Q. From June to November. When did you see her again after November, 1956?

A. June of '57.***

Q. In other words, you have seen her twice within the last year? (839)

A. That is correct.

Q. Then why do you say she should be examined by a doctor once a month?

A. I thought I made it clear that when anyone is using a substance as toxic and as treacherous as Tridione which is a notorious drug which could produce destruction of the white cells, it is the responsibility of the physician to protect his patient from the drug as well as the disease.

Q. When did you prescribe Tridione?

A. I don't recall whether it was November or June; and then I raised it.

Q. I beg your pardon?

A. I say I don't recall whether I initially prescribed Tridione in November or June, but I subsequently raised the amount."

It would seem obvious that the trier of the fact if allowed to consider the fact of mitigation of damages might well have found that had Miss Blakley gone to

the doctor more often or had she gone more promptly, she would not have been in the condition she appeared to be in during the trial. Not only does the evidence of Dr. Southcombe, plaintiff's own doctor, support this theory, but also the evidence of appellant's medical experts that epilepsy is a condition that can be controlled by the use of modern medicine and that one afflicted by such need not exhibit the classic signs of epilepsy, namely the symptoms of dramatic convulsive attacks.

This omission of the mitigation of damages might well have resulted in a substantially smaller verdict. Therefore, failure to submit that issue constituted prejudicial error, entitling appellant to a new trial.

With respect to the issue of contributory negligence and assumption of risk, we believe the appellant has even a much stronger position. Your Honors will recall that Miss Blakley sat in the rear of the bus with several girls. Your Honors will recall that those who noticed fumes began noticing them shortly after leaving Spokane and that Miss Blakley was one of those. Nevertheless neither she nor any of the other girls complained to the driver until three-quarters of the way to Pullman just shortly before they got to Colfax. Even then they took no steps to protect themselves, not moving forward until later (R. 1175).

Your Honors will recall that after some of the passengers noticed the fumes some of them opened their windows shortly after leaving Spokane and some dis-

tance before the bus driver actually stopped the bus. *If* the fumes were as bad as some of plaintiff's witnesses made them out to be at the time of the trial, Miss Blakley was obviously negligent in failing to protect herself and in failing to do so after noticing the fumes, she obviously assumed the risk. You cannot deliberately stay under water without assuming the risk of drowning. On the record in this case, the jury was entitled to find that Miss Blakley either negligently contributed to her situation by failing to take immediate steps to protect herself or assumed the risk thereof.

In *French v. Chase*, 48 Wn. (2d) 825, 297 P. (2d) 235, the trial court had withdrawn the issue of contributory negligence. The Supreme Court reversed the trial court on this point, stating, page 830, 831:

> "By instruction No. 3, the court directed the jury to disregard the defense of contributory negligence and, by so doing, decided that the minds of reasonable men could not reach different conclusions from the evidence. *Beck v. Dye*, 200 Wash. 1, 92 P. (2d) 1113, 127 A.L.R. 1022 (1939); *Billingsley v. Rovig-Temple Co.*, 16 Wn. (2d) 202, 133 P. (2d) 265 (1943); *Roloff v. Bailey*, 46 Wn. (2d) 358, 281, P. (2d) 462 (1955).
>
> "(5) There was conflicting evidence on the question of imminent peril, that is, whether there was an emergency requiring immediate action. Likewise, there was a question for the jury as to whether the situation, as it was presented, necessitated the extreme physical exertion employed by the respondent in effecting the rescue.
>
> "In the light of the evidence, it is our opinion that the minds of reasonable men could have differed in

determining these questions. The issue of contributory negligence with reference thereto should have been submitted to the jury."

In *Wines vs. Engineer's Limited Pipeline Company*, 151 Wash. Dec. 446, the court said, page 451:

"***only in rare instances is the court warranted in withdrawing the issue of contributory negligence from the jury."

In *Berndt vs. Pacific Transport Co.* 38 Wn. (2d) 760, 231 P. (2d) 643, the Supreme Court of the State of Washington stated, pages 765-766:

"In *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, this court said:

" 'Generally the question of contributory negligence is for the jury to determine from all the facts and circumstances of the particular case, and it is only in rare cases that the court is justified in withdrawing it from the jury. (Citing cases and authorities.)

" 'There are two classes of cases in which the question of negligence may be determined by the court as a conclusion of law, . . . The first is where the circumstances of the case are such that the standard of duty is fixed, and the measure of duty defiined, by law, and is the same under all circumstances. (Citing cases.) And the second is where the facts are undisputed and but one reasonable inference can be drawn from them. (Citing authorities.) If different results might be honestly reached by different minds then negligence is not a question of law, but one of fact for the jury.'

"This case has been repeatedly cited in our opinions and by courts of other jurisdictions.

"In 10 Blashfield, Cyclopedia of Automobile Law and Practice (Perm. ed.) 510, sec. 6594, the rule is stated as follows:

" 'Where the nature and attributes of the act relied upon to show negligence constituting a proximate cause of the injury complained of can only be clearly determined by considering all the attending and surrounding circumstances of the transaction in question, it falls within the province of the jury to pass upon the character of such circumstances . . .

" 'If the evidence on the question of negligence is conflicting or such that reasonable men can draw different conclusions therefrom, the question is one for the jury. The court will not decide it as a matter of law, except under the clearest circumstances. But what amounts to due care and negligence depends upon the circumstances of each particular case.'

"In the case of *Hadley v. Simpson*, 9 Wn. (2d) 541, 115 P. (2d) 675, this court, speaking through Blake, J., said:

" 'The questions of contributory negligence and negligence are so interrelated that the former usually cannot be determined without reference to the latter. (Citing cases.) It is for this reason that this court has frequently said that, in negligence cases, the facts make the law. By the same token, decided cases afford little help in determining the issue.'

"The recent cases of *Discargar v. Seattle*, 25 Wn. (2d) 306, 171 P. (2d) 205, and *Mitchell v. Rogers*, 37 Wn. (2d) 630, 225 P. (2d) 1074, are also in point.

"(3) From the record, it clearly appears that the evidence presented several disputed questions for the jury to decide."

Since some of the people moved forward or opened windows before Miss Blakley did, there obviously was room for reasonable minds to differ as to whether or not she should have moved forward sooner for her own protection and therefore was guilty of contributory negligence or assumption of risk in failing to do so.

Therefore, the court's failure to give appellant's proposed Instructions submitting the issues of contributory negligence, assumption of risk and mitigation of damages constituted prejudicial error.

IV.

EXCESSIVE VERDICT

It is respectfully submitted to the court that the extremely high verdict in this case (one of the largest ever returned in a personal injury action in the Southern Division of the Eastern District Court) could have been returned only as a result of sympathy toward plaintiff constituting passion and prejudice. The plaintiff was and is a beautiful girl with an attractive personality. There is a picture of her in one of the exhibits (Ex. 5) taken and published not too long before the trial and we invite Your Honors' inspection. In the first place it is significant that very few, if any, disinterested observers ever witnessed one of the so-called attacks. Both Dr. Southcombe and Dr. Hood admitted that they had seen or observed none. Likewise, she did not experience any while under observation for several days at the Virginia Mason Clinic in Seattle. Not only did the doctors who examined her for the defendant, including Dr. Hale Haven, one of the foremost neurologists and neurosurgeons in the State of Washington, who failed to find anything significant in her E.E.G. or his examination of her and attempted to demonstrate

with her that there was nothing much wrong with her, but ran into considerable difficulty with counsel and the court (R. 1009, 1010, 1024, 1027-29, 1038-39).

Not only did Dr. Freeman of Colfax, Dr. Freund in Kennewick, and Dr. Haven with the Virginia Mason Clinic in Seattle fail to find anything but normalcy, but it is also significant that others who were quite close to her failed to observe anything out of the ordinary. Emma Lou Hoover testified as follows (R. 1047-56 et seq):

> "Q. Do you know Jeannie Blakley?
>
> A. Yes.***
>
> Q. When did you first meet her?
>
> A. Late June of 1956.***
>
> Q. Did you later arrange for the two of you girls to live together in a home?
>
> A. Yes, we did.
>
> Q. Where was that home?
>
> A. In Bauer-Day Housing. The address was 2101 Dallas.***
>
> Q. How did this arrangement come about? How did you girls happen to live together?
>
> A. Well, we talked about it for, I would say, about a month, and I don't actually remember whether it was my idea or Jean's idea. It was just sort of a mutual agreement.***
>
> Q. Did Jeannie ever state to you why she was leaving her folks' place and moving in with you? (1267)
>
> A. Well, the way I understood it then is that she had never lived away from her parents other

than just a few months in college and she kind of wanted to strike out on her own to live there.***

Q. (By Mr. Hawkins) Then you girls lived together from about the 1st of December, 1956, until about the 1st of May, 1957, this last May?

A. Yes, sir.***

Q. Did you see her in the mornings?

A. Oh, yes, sir, I woke her up.

Q. And did you see her in the evenings?

A. Yes.***

Q. During that time, did Jeannie drive an automobile?

A. She did when we first moved in. It seems to me she did after that, I can't remember exactly.

Q. Did she have a car of her own at that time?

A. When we first moved into the house, she was buying a car from her parents.

Q. She was buying a car from her folks?

A. Yes, sir.***

Q. How, then, during the time that you were together in the house, did you ever see Jeannie have an attack of fainting or collapse, anything of that kind? Did you see that?

A. No.

Q. And during all that time from about the 1st of December to the 1st of May, 1957, you saw her practically every morning and every evening?

A. I would say almost, yes.

Q. And during all of that time, you never saw Jeannie collapse and fall?

A. No, sir.

Q. Or faint?

A. No.***

Q. Did she say anything about her driver's license with respect to this lawsuit?

A. Just that she was going to give it up because if she had it, it wouldn't look so good.***

Q. (By Mr. Hawkins): Now, what about Jeannie's activities during the months that you were living with her? Was she sick a lot or was she normal, or how would you describe it?

A. As normal. She had headaches once in awhile. She didn't seem restricted.***

Q. Did she go dancing?

A. Yes, sir.

Q. And how would you describe her insofar as dancing was concerned?

A. She was a good dancer, very good.

Q. Did she have any trouble with stability at all when she was dancing? (1271)

A. No, she was exceptionally good jitterbugging.

Q. Do you know whether she went sking last winter?

A. Yes, sir, I went with her one Saturday and I knew she went several times after that.***

Q. (By Mr. Hawkins): Now, did Mrs. Blakley come and check on Jeannie?

A. And check on Jeannie?

Q. Yes.

A. No.

Q. Well, how often did Mrs. Blakley come to your home?

A. Not very often. My parents didn't come very often, (1272) either. We had a housewarming about two weeks after we moved into the house and,

of course, they were there then, and I would say they were there perhaps four or five, six times.

Q. Did they tell you that you should watch out for Jeannie?

A. No.***

Q. (By Mr. Hawkins) : Now, Jeannie held down a job during that time that she lived with you?

A. Yes, sir.

Q. And how did she enjoy her work?

A. Oh, she seemed to, yes.

Q. Did she put in any overtime that you know of?

A. Yes, sir, she worked on Saturdays occasionally.***

Q. Do you know why she gave the car back to her folks? (1273)

A. Well—***

Q. Did Jeannie say anything?

A. We couldn't afford it—she couldn't afford it.***

Q. Then you drove down to Pendleton, got there at 2 in the morning, and drove back to Richland, stayed there an hour, and drove on to Spokane?

A. Yes, sir.

Q. And then you shopped all day?

A. Yes.

Q. Jeannie was with you?

A. Yes, sir."

Walta Lee Hoover testified as follows (R. 1074 et seq.) :

"Q. Now, your sister had a home of her own in Richland part of the time?

A. Yes, sir.

Q. And Jeannie lived with her?

A. Yes.***

Q. How often did you go there?

A. Well, I spent nearly every week end with them while they were living there.

Q. Did you observe whether Jeannie was normal or not?

Mr. Tonkoff: Well, now that is objected to, your Honor.

Q. (By Mr. Hawkins): Tell us—

The Court: Yes, I think that calls for a conclusion.

Q. (By Mr. Hawkins): What did Jeannie do? Did she do anything out of the ordinary?

A. No, sir.

Q. Did she carry on a conversation?

A. Yes.

Q. Did she have trouble remembering things?

A. No.

Q. Did she go to dances?

A. Yes.

Q. How was she as a dancer?

A. Very good. I envied her.

Q. Beg your pardon?

A. Very good, I envied her.

Q. Was she unstable on her feet?

A. Oh, no. (1299)

Q. Did you ever see her fall or collapse?

A. No.

Q. Did you ever see her faint?

A. No.***

Q. And who drove the car that you picked up back?

A. Jeannie drove back.

Q. Did you ride with her?

A. Yes, I was in the back seat part of the time sleeping and part of the time awake.

Q. And Jeannie drove all the way from Pendleton to Richland?

A. Yes, sir.

Q. And what time of day was it that you left Pendleton?

A. Oh, we left shortly after we got there. We got in between 2:30 and 3, I would say at the latest 3:30 in the morning.

Q. In the morning?

A. Yes, sir.

Q. And then she drove back to Richland? (1300)

A. Yes, sir.

Q. Did you go to Spokane with them?

A. No, I didn't. I was quite tired so I went to bed.

Q. You stayed in Richland?

A. Yes, I did.

Q. And then she and your sister went on to Spokane?

A. Yes.***

Q. ***What kind of dancing did Jeannie do?

A. Well, ballroom dancing and then she did bop and jitterbugged.

Q. How was she at that?

A. Well, to me, she seemed very good. I don't bop or jitterbug myself so I really couldn't say she was very good or average.

Q. You actually saw her dancing yourself?

A. Yes.

Q. And did she have any trouble with her balance?

A. Not that I noticed.

Q. Did Jeannie ever tell you that she was planning on getting married?

A. Yes, sir.

Q. And who was she planning on getting married to?

A. Don Croft.***

Q. Do you know what he is doing, or did Jeannie tell you what he is doing?

A. Studying psychiatry, I think."

Mary Louise Fulseth, a sorority sister, and her roommate, testified as follows (R. 1195 et seq.) :

Q. What sorority did you belong to, Mary Lou? (1443)

A. Chi Omega.

Q. Was that the sorority Miss Blakley was a member of, or had been pledged to, I should say?

A. Yes, it was.***

Q. Did you room with her at any time after November of 1955?

A. Yes, I did.

Q. And how long a time did you room with her?

A. Approximately two—approximately a month and a half to two months.

Q. When was this?

A. It was from the semester, which was approximately the end of January 1st to February, to spring vacation or shortly after that, just right around there.***

Q. And you occupied the same room at that time? (1444)

A. Yes, I did. There were four of us.***

Q. Now, during the time that you were with Jeannie, did you ever observe a fainting spell yourself?

A. I did not observe one."

It is also significant that the clinical findings of the lack of knee reflexes, the lack of attention or inability to concentrate and fainting or dizzy spells (so heavily relied on by appellee and her doctors) are the very things that show up in Exhibits 54 and 55, the information taken by the examining doctor on her admission to W.S.C., and *before the bus ride in question!*

Even Joann Hodges, one of plaintiff's strongest witnesses, testified as follows (R. 175):

Q. In May of 1956?

A. Yes.

Q. Was that the first time that you had seen Jeannie faint?

A. Yes.

Q. As I understand it, you did not report that to the House Mother?

A. No.

Q. Did you advise Jeannie to go to the infirmary?

A. It was not my place to advise her.***

Q. Was Jeannie moved to the infirmary, at that time?

A. Not to my knowledge. (168)

Q. You were there?

A. I was there.***

Q. Did she go out on dates very often?

A. Yes.***

Q. Did she go to dances after November, 1955?

A. Yes; I imagine.

Q. Did she complain to you of headaches after November, 1955?

A. Yes.

Q. Did you report that to anyone?

A. The Senior Member.

Q. Did you tell Jeannie that she ought to go to the infirmary?

A. No.

Q. Did you tell her she ought to go and see a doctor?

A. Not to my knowledge. I don't remember if I told her (169) that or not."

Even Noreen Anderson, who was one of the more aggressive witnesses for the plaintiff, testified as follows (R. 200):

"Q. To your knowledge, was Jeannie ever taken to the infirmary at WSC?

A. Not to my knowledge, no.

Q. Was she ever taken to the doctor at the infirmary or was the doctor at the infirmary ever taken to the house to see her?

A. Not to my knowledge, no.

Q. Did Jeannie ever complain to you as to what was wrong with her?

A. I knew she wasn't feeling well. She complained of the fact she was having difficulty when she was studying. But she never came right out and told me what was the difficulty."

Counsel made much of the fact, or claimed fact, that she was unable to concentrate and related this to the incident on the bus (R. 201). The truth is Miss Blakley herself complained of her inability to concentrate, dizziness, and hyporeflexia in September when being admitted to the college. See Exhibits 54 and 55, where these things are specifically mentioned.

In view of this mass of evidence (and the record is replete with much more) that there was little if anything wrong with Miss Blakley, except what she had complained of before the bus ride, it is apparent that the verdict of the jury was unmistakeably the result of passion and prejudice and was definitely contrary to the weight of the evidence.

In this connection we would also call your Honors' attention to the pathetic picture painted by counsel's examination of Miss Blakley in which she could hardly remember even going to college (R. 792-3):

"Q. Do you remember when you went to college?

A. I know I went to college.***

Q. Do you remember?

A. I don't know what I remember, and what people have told me I think I remember, but I am not sure.

Q. Do you remember your wanting to go to the football game in November, 1955; do you remember that?

A. No, sir.

Q. Do you remember going to Spokane on November 19, 1955?

A. No, I don't.***

Q. Do you remember being in the hospital overnight at Colfax?

A. No.

Q. Well, Jeannie, can you tell us the first thing that you can remember? Now, try hard. Do you remember somebody picking you up on the streets in Colfax on the morning of November 21, 1955?

A. No.

Q. Do you remember somebody taking you back to school on November 21, 1955?

A. No."

And so on.

Compare this with the separation report prepared by one of her immediate superiors, Exhibits 56, 57 and 58, (R. 857-80), in which it is stated that the reason for separation from General Electric was that she "will attend legal proceedings involving personal injury, later to be married and move from area." "Enjoyed work very much." Compare this also, with a letter which she wrote in her own handwriting (R. 809) just shortly before the trial to General Electric which reads in full as follows (Ex. 51) (R. 810):

"Kennewick, Washington, October 7, 1957. Personnel Office, General Electric Company, Richland, Washington.

"Gentlemen: I have been informed in regard to my release as an employee of General Electric, that the termination papers state that I was released for 'legal procedure and forthcoming marriage.' I can't understand why legal proceedings should have anything to do with my termination as long as the proceedings do not involve General Electric. As for getting married, I have hopes like every young girl but hope alone does not accomplish the fact.

"When I went to work for the company, I did not know of any permanent physical disability. It later developed that I had a permanent impairment from carbon monoxide poisoning. This injury resulted (977) in fainting spells and lapses of memory and consciousness. Therefore, I must admit my attendance record was very poor.

"When my condition became known to the Medical Division, I was asked to resign on three different occasions.

"To keep the records clear, I request that this letter be placed in my file to show that the true reasons for my termination was my medical history rather than the reasons given on my termination report.

Very truly yours,

Jeanne Blakley."

This letter, written in Miss Blakley's own handwriting, shows not only her disposition towards this particular case but also shows that there is nothing wrong with her mind. No atrophy! It is significant also that her immediate superior, who would actually know whether or not she suffered attacks while employed by G. E. during the year immediately before the trial was

not called by the plantiff, nor was his deposition taken. Rather than bring anyone who worked with her, one David Buel was called by the plaintiff who worked in the office next door. He testified as follows (R. 261):

"Q. How often did you see her, Mr. Buel?

A. Every day.

Q. For a period of almost a year—about a year, there?

A. Pretty close to a year, yes.

Q. In your own words will you tell the members of the jury here, what you saw about this girl, physically?

A. When?

Q. During the time you saw her at work, there; you said you saw her every day?

A. When she was hired, she was a very good worker and did a good job. Later on she tended to be more absent from (274) the job—later on.

Q. Did you notice anything about her demeanor when she was working or during the lunch hour; did you see her during lunch hour or at any other time?

A. No. I ate lunch with the men, during the lunch hour.

Q. Did you see her in the office?

A. During the lunch hour?

Q. At any other time did you notice anything unusual about her?

A. No, except that every now and then she would say she wasn't feeling so good or something like that. This was later on during her employment period.

(As the trial drew closer.)

Again on cross-examination, on page 264:

> Q. Mr. Buel, what kind of work did Jeannie do, during this last year when she was employed by General Electric?
>
> A. She was secretary to the manager of the Employee Communications Operation.
>
> Q. She was secretary to the manager of that department?
>
> A. Yes.
>
> Q. My question was: What kind of work did she do?
>
> A. Typing and shorthand.
>
> Q. Did you have occasion to observe whether or not she did a good job?
>
> A. Yes. I thought that she generally did a good job. Once in awhile she might possibly—she apparently forgot something. But I just attributed it to overwork—not overwork, excuse me; just busyness.
>
> Q. Just the usual thing that you would expect?
>
> A. Once in awhile you get a little busier than usual.
>
> Q. There was nothing abnormal about it?
>
> A. About her work?
>
> Q. Yes.
>
> A. No."

Likewise, it is significant that Miss Blakley was not living at home, but was living in Richland with Emma Lou Hoover whose testimony has been set forth above.

It is simply impossible to believe that the amount of the verdict was not dictated unmistakeably by passion and prejudice. Not only is there no factual basis for the amount; but obviously it is against the great weight of the evidence. It is based entirely upon emotion.

V.

NEGLIGENCE OF THE DRIVER

The view that one of the issues of the case was whether or not the driver of the bus, Mr. Hamilton, had been negligent, did not appear until the District Court suggested it in connection with his ruling upon the motion of appellant made at the close of plantiff's case (R. 820). Prior to that time it had not been suggested in the pre-trial order or in the pleadings.

The appellee offered no evidence specifically that the driver was negligent. There was no testimony that he could have detected the fumes sooner than he did. There was no evidence that after being notified of the fumes he was on the highway an unreasonable length of time, or that he could have stopped or pulled off the highway sooner than he did. There was no evidence of anything that he should have done or anything that he should not have done to support the contention of negligence on his part. He drove directly to the fire station in Colfax, and arranged out of an over abundance of caution for hospitalization and medical attention for Miss Blakley. The fact that none of the others on the bus who were in-

terested in getting to their destinations suffered any consequences would seem to refute any contention of negligence. As a matter of fact, but most important, there was no standard of care established, nor was there any indication that the driver violated any standard of care. So far as we know, and we are sure that the record does not disclose otherwise, even counsel for plaintiff at no time contended that the driver was negligent. Therefore, it was erroneous to submit this issue to the jury as it is axiomatic that the jury should not be instructed upon an issue that is not before it, or upon an issue as to which the plaintiff has offered no evidence. *Rastelli v. Henry*, 131 P. 643, 73 Wn. 227. *National Bank of Commerce v. U. S.*, 224 Fed. 679. *Bailey v. Carver*, 319 P. (2d) 821, 51 Wn. (2d).

CONCLUSION

It is respectfully submitted that the judgment below should be reversed with directions to enter a judgment of dismissal in favor of the defendant upon the ground and for the reason that there was no evidence of carbon monoxide in unsafe quantities in the atmosphere of the bus at the time in question. There being no proof, substantial or otherwise, of the existence of carbon monoxide within the bus, then it cannot be said that the defendant negligently permitted it to be in the atmosphere of the bus. In any event, there should be a new trial in this case as the District Court erroneously permitted the issue of *res ipsa loquitur* to go to the

jury, erroneously withdrew the issues of contributory negligence, assumption of risk and mitigation of damages, and in any event the verdict should be set aside as based unmistakeably on passion and prejudice and because of its excessiveness.

Respectfully submitted,
KENNETH HAWKINS,
Attorney for Appellant

No. 15949

In the
United States Court of Appeals
For the Ninth Circuit

THE GREYHOUND CORPORATION,
Appellant,

vs.

JUANITA JEAN BLAKLEY, a Minor, by Her Guardian Ad Litem, Sidney W. Blakley,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLEE

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On Appeal from the United States District Court for the Eastern District of Washington, Southern Division

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On Appeal from the United States District Court for the Eastern District of Washington, Southern Division

---

BRIEF OF APPELLEE

JURISDICTION

This is an action by appellee, plaintiff below, who is a resident of the State of Washington (R. 12) against the appellant, who was defendant below, for injuries received as a result of carbon monoxide poisoning while a passenger on the appellant's bus (R. 12). The appellant is a Delaware corporation (R. 11). Jurisdiction of the trial court was invoked by reason of diversity of citizenship between the parties in accordance with USCA, Title 28, Sec. 1332. Jurisdiction of this court is invoked by reason of USCA, Title 28, Sec. 1291.

Judgment in the court below was entered December 17, 1957 (R. 52). Motion for new trial was served and filed December 20, 1957, (R. 50) and this motion was denied January 17, 1958 (R. 51). Notice of appeal was filed February 14, 1958 (R. 53). Bond on appeal was filed February 14, 1958 (R. 55).

STATEMENT OF THE CASE

The appellant, in its statement of the case, has omitted many material facts which the appellee deems necessary in order that this court view this case in its true perspective. Accordingly, appellee deems it necessary to make her own statement of the case.

Appellee, Juanita Jean Blakley, was born in Prosser, Washington, on January 29, 1937 (R. 395, 495). She moved to Bremerton in 1941, where she resided with her parents until 1945 (R. 396). The family then moved to Coulee Dam, where her father was employed by the Bureau of Reclamation (R. 396, 496). Appellee attended grade school at Coulee Dam (R. 396, 496). As a child the appellee had the usual childhood diseases consisting of measles, mumps, chickenpox (R. 497). She was a very active child (R. 329); she had a good school attendance, and graduated from the eighth grade at the top of her class and on the honor roll (R. 499). Her disposition was good (R. 398). She was a cheer leader, a majorette, and a member of the Rainbow Girls (R. 339, 397).

In July of 1951 the appellee and her parents moved to Kennewick, Washington (R. 399, 498), where she entered and finished her high school education (R. 400). She possessed good health and experienced no physical ailment (R. 255, 285). She was a cheerful and happy person (R. 489). She was vivacious as well as being a good student, and showed great promise (R. 285, 401, 1359). She participated in extracurricular activities by working in the library (R. 500, 1356) and was a high school cheer leader and majorette (R. 251, 256, 400). She belonged to several honorary organizations (R. 499). One of her high school teachers described her high school career. She pointed out that the appellee was a very unusual girl, very active, and took active part in extracurricular work such as dramatics and was a member of the staff of the year book published by the high school (R. 212). She was a good typist (R. 209) and a member of the national dramatic honorary society, to which only top students were admitted (R. 212). She was a member of Quill and Scroll, an international honorary society, and a member of the Pep Club for football and basketball games in addition to her acting as a majorette (R. 212, 213). Apellee was a member of the Girls' Athletic Association, and took an active part in the production of high school plays. She had an I.Q. of 107 and graduated from high school with an average grade of 91.8 (R. 215, 221).

Upon graduating from high school in the spring of 1955 appellee matriculated at the Washington State

College at Pullman, Washington. She was chosen by the Chi Omega Sorority as one of its pledge members in September of 1955 (R. 502). Prior to November 20, 1955, her sorority sisters described her as being in good health (R. 73), energetic (R. 182) and vivacious (R. 116). She was very easy to get along with (R. 149, 168, 182, 255, 304, 347).

On November 19, 1955, appellee, accompanied by her sorority sisters Pattie Murphy, Sandra Whitney and Karen Gilbertson, left Pullman, Washington, on appellant's bus destined for Spokane, Washington, where appellee desired to do some shopping (R. 74, 116). She was taken to the home of friends of her parents (R. 75) where she spent Saturday night (R. 327, 338). On the following day, Sunday, November 20, 1955, appellee went to the home of Karen Gilbertson's parents where she had dinner and was then taken to the bus depot in Spokane to board appellant's bus, which was due to leave at 7:00 o'clock p.m. (R. 75, 117).

Appellant's bus was delayed for approximately one hour in order to make connections with an incoming bus from Seattle which had been delayed (R. 76, 113, 117, 225, 1090). While the bus was in the passenger station at Spokane a Mr. Charles Wheaton, who was a prospective passenger on his way to Moscow, Idaho, which is beyond Pullman, Washington, observed that the bus was an old 1948 model bus (R. 227, 247).

Appellant's superintendent of maintenance for the northern division testified that the bus in question, prior to its departure from Spokane on the night of November 20, 1955, had 883,840 miles logged up (R. 1264). As Passenger Wheaton was standing by the bus he noticed Clare Hamilton, the bus driver, and another person go to the rear of the bus, and open the motor compartment and while there carry on a conversation for about five minutes (R. 227). Eventually they closed the motor gate and allowed the passengers to board the bus (R. 227). (The company's records show the motor gate was in disrepair at that time [Ex. 10], because they had an order to repair it on November 19, 1955, and the repair was not made until November 21, 1955 [R. 1243, 1244, 1245]). Appellee, Karen Gilbertson and Pattie Murphy got on the bus at Spokane and took the only available space which was on the lefthand side of the back seat of the bus (R. 76, 117, 127). In this bus the engine is under the back seat (R. 69). The bus was loaded to capacity with 37 passengers and the driver making 38 (R. 96, 1090). The bus was destined for Lewiston, Idaho, traveling through Spangle, Rosalia, and Colfax, Washington, thence to Pullman, Washington, and into Moscow and Genessee, Idaho (R. 1091). There was an overload of passengers who were put on the following bus which was being operated by appellant's driver, Charles Bailey (R. 1091, 1188).

Near the outskirts or city limits of the City of Spokane, Washington, or shortly thereafter, some of the passengers started to smell fumes in the passenger compartment (R. 77, 117, 118). No one apparently felt any concern about the fumes at that time. There is no testimony in the record from the appellee as to when she began smelling fumes. Because of the nature of her injuries, her memory has been destroyed and she has no recollection of the trip whatsoever (R. 793). This is common in carbon monoxide poisoning cases and is medically known as retrograde amnesia (R. 567). The odor of fumes increased as the bus progressed on its trip in the vicinity of Spangle and Rosalia (R. 77, 85, 97, 98, 99, 117, 1352). Pattie Murphy attempted to open the left rear window but it wouldn't open (R. 118) and also Karen Gilbertson tried to open the window (R. 77) but it would not open. Other passengers noticed the gas fumes in the vicinity of Rosalia (R. 1298, 1339, 1341, 1343, 1344, 1345). Other passengers experienced sickness, nausea and headaches (R. 1140, 1141, 1195, 1206, 1303, 1350). Some of the passengers went so far as to put scarves around their faces to attempt to protect themselves (R. 1167, 1170, 1180, 1195, 1198, 1206, 1298, 1339, 1343, 1345). Both Karen Gilbertson and Pattie Murphy testified positively that they did not know the effect of the fumes (R. 77, 118). There is no testimony in the record that any of the other passengers aboard the bus knew the effects of these fumes. It should be noted at this juncture

that carbon monoxide gas is an odorless, tasteless and colorless gas (R. 446). The fumes that one smells are actually oxides of nitrogen (R. 446).

Shortly before reaching Rosalia Pattie Murphy went forward in the bus and advised the bus driver that she was ill from gas fumes (R. 100, 118, 122, 128, 132). In this she is corroborated by Karen Gilbertson (R. 77, 78). Pattie Murphy sat down in the aisle on a cushion which the bus driver gave her and he opened the window by his side (R. 141, 142, 1110). She also advised the bus driver that the fumes were more prevalent in the back of the bus (R. 119). At Rosalia the bus driver stopped the bus for a regular passenger stop and Miss Gilbertson, Miss Murphy and the appellee, as well as some of the other passengers, emerged from the bus. Miss Gilbertson testified that she believed that the condition of the fumes in the bus was mentioned to the bus driver at that time (R. 79).

After the bus left Rosalia and somewhere in the vicinity of Cashup, Karen Gilbertson and appellee went forward in the bus because they were sick (R. 78, 79, 120, 1093). Appellee and Karen Gilbertson advised the bus driver that they didn't feel well (R. 79, 120). Several minutes later the bus driver pulled the bus off to the side of the highway and the three girls got off the bus to get some fresh air (R. 79, 120, 1093). Appellee passed out (R. 80, 120). At the time of this stop of the bus the driver went to the rear of the bus where he

detected fumes which were particularly prevalent in the last four seats and he proceeded to open all windows that could be opened (R. 1094, 1095, 1119, 1123). Appellee upon getting out of the bus at this time fainted and had convulsions so that it was necessary to help her get back on the bus (R. 80, 113, 120, 1122, 1123). The driver requested two men who were seated in the two front seats to give up their seats to Miss Gilbertson and appellee (R. 80, 121, 229, 1096, 1117). Appellee was gasping for air (R. 121, 1175, 1176, 1123). She was throwing herself about in the seat and became irrational and semi-conscious (R. 121, 230, 1118). Appellee remained in this condition and was in this condition at the time she was removed from the bus at Colfax (R. 81, 230, 358, 365). The bus driver drove immediately to Colfax, Washington, and he stopped at the fire station where he knew he could procure ambulance service (R. 1097). The driver carried appellee out of the bus and put her on the stretcher (R. 1098), which stretcher was in turn put into the ambulance (R. 103, 231, 358). The ambulance attendants administered oxygen to appellee on the way to the hospital and at the hospital (R. 365). Miss Gilbertson and Miss Hays went to the hospital in the ambulance with appellee (R. 82, 121). The bus driver called Dr. Freeman, a general practitioner of medicine at Colfax, Washington (R. 1098) and advised the doctor of the surrounding circumstances (R. 1098). Dr. Freeman stated that he had been called and informed that some-

one had been overcome by fumes on the bus (R. 978). At the hospital the doctor was also informed that the girl had been gassed (R. 367, 83). The doctor took the oxygen mask off plaintiff's face (R. 979) and made a supraorbital examination, which consists of applying pressure above the eye. The appellee was unable to speak so that she could not give the doctor any history, but she was coughing violently and hard to control (R. 968, 969, 989, 83). After this ten or fifteen minute examination made by Dr. Freeman (R. 998) during a period that appellee could not and did not talk but was coughing violently and hard to control and sideboards on her bed were necessary (R. 989), the doctor ruled out carbon monoxide poisoning and diagnosed plaintiff's ailment as hysteria (R. 972, 990). The following morning appellee was dismissed from the hospital (R. 1000).

Karen Gilbertson and Miss Hays returned from the hospital to the bus depot and the trip from Colfax to Pullman, Washington, was resumed (R. 85). The windows of the bus were opened (R. 85); the weather was cold (R. 85), and after leaving Colfax the passengers started moving towards the front of the bus (R. 86). It was after appellee had become ill and had gone outside of the bus when passengers started to move towards the front of the bus (R. 121). Between Colfax, Washington, and Pullman, Washington, the bus finally stalled (R. 86, 122, 233). The engine was running hot

(R. 1191). The engine of the bus was running with a winter front; in other words, the radiator was completely covered, which cut off the air to the motor (R. 1101). The battery would not turn over the starter of the engine (R. 1102, 233). It was necessary for the following bus operated by Mr. Bailey to give a push to the bus in order to start it (R. 1101, 1102, 1137, 1189, 234). At Colfax and again at Pullman Mr. Hamilton stated that he would not take the bus any farther than Pullman (R. 86, 122, 234).

The mechanical condition of the bus involved in this controversy was such that after arriving at Pullman all of the passengers were evacuated and the remaining passengers who were scheduled for Moscow and Lewiston, Idaho, were transferred into the following bus operated by Mr. Bailey (R. 234, 1102, 1126). Mr. Hamilton, the bus driver, stated: "If you have trouble with a bus, if there is any complaint, you don't use it." (R. 1126). He further stated that a defective bus should not be used to haul passengers (R. 1127) and that carbon monoxide fumes are very dangerous when in the passenger compartment (R. 1135). Mr. Bailey, who had been operating the second bus, took over the bus in which the appellee had been riding, at Pullman, Washington, and then deadheaded the same back to Spokane (Ex. 10). Both Mr. Hamilton and Mr. Bailey, bus drivers for the appellant, in Exhibit 10 stated for the benefit of their company records that the diesel

fumes were bad in the seats and that the engine was running hot.

On November 21, 1955, Elizabeth Greenlee, a sorority sister of appellee, noting that she was absent from the sorority house, went to Colfax, Washington, to attempt to find appellee. She found that appellee had left the hospital in the morning (R. 314) so she then went to the bus depot in search of her. She finally found the appellee aimlessly wandering about the street and picked her up and brought her to the sorority house at Pullman (R. 303). Upon returning to Pullman appellee was confined to her bed for about a day and her sorority sisters noticed that she was depressed, slept a lot, was afflicted with headaches (R. 189, 304, 306); she appeared sick and was taking aspirin (R. 87, 183, 184, 187). She did not appear to have any energy, and as time progressed it was noticed that she became worse in that she was getting dizzy spells, lapse of memory, and was required to lie down (R. 88, 89, 107, 125, 150). Appellee began to have difficulty in retaining her studies (R. 124, 151, 169, 202, 307, 348). She lost weight (R. 169), and by April or May she started to have fainting spells (R. 161, 170, 172, 302, 347, 351). On one occasion the house mother of the sorority where appellee lived would not allow one of the sorority sisters to call a doctor for appellee at a time that appellee had apparently fainted (R. 184). This was due to the fact that the house mother was a Christian Sci-

entist and did not believe in a doctor of medicine (R. 185). This was in May, 1956 (R. 184).

On November 21, 1955, after appellee had been returned to Pullman by her sorority sister, Elizabeth Greenlee, the appellee called her family and complained that she had a headache and was not feeling well (R. 509). On the following Thursday appellee went to her home at Kennewick for Thanksgiving vacation. At that time her family noticed that she appeared tired, irritable, complained of headaches and was nauseated (R. 402, 510). When appellee returned for Christmas vacation her family noticed that her condition had become worse and she appeared thin, nervous, upset, and had lost weight and was very irritable (R. 511). They then took her to a general practitioner in Kennewick, Washington (R. 403) who, at that time, did not discover appellee's true condition but advised that a specialist should be consulted if the family was concerned (R. 511, 1134).

As time progressed appellee's family became concerned about her because they noticed that she was emotionally upset, unsteady on her feet (R. 410, 513), and further observed that she was developing a defect in her speech. As a consequence an appointment was made in the early part of May, 1956, with Dr. Robert Southcombe, a specialist in the field of psychiatry and neurology at Spokane, Washington (R. 407, 515, 665).

On May 7, 1956, Dr. Southcombe took a history and performed a psychiatric, neurological and physical examination of appellee (R. 665). At the same time Dr. Millard Jones was called in for consultation as a neurological specialist at Spokane (R. 377). Dr. Jones took an electroencephalogram (R. 677) which is commonly referred to as an EEG for the purpose of discovering whether there was any brain injury (R. 378). Appellee's EEG tracing disclosed that her brain wave was abnormal (R. 380).

Dr. Southcombe, not being satisfied with the results of his first examination, concluded that further investigation was necessary. The result was that on June 13, 1956, the appellee was hospitalized at Spokane, Washington, at which time a spinal puncture was performed upon her and also x-rays were taken of her skull (R. 666). The spinal fluid was determined to be normal (R. 666); this rules out brain tumor (R. 598, 599). Dr. Southcombe diagnosed appellee's ailment as an organic encephalopathy as the result of toxin, specifically carbon monoxide, which was manifesting itself in convulsive phenomena (R. 667). He prescribed anticonvulsive drugs of phenobarbital and mysoline, and as time progressed he increased the dosages and added tridione, also an anticonvulsive drug, useful in the treatment of petit mal type seizures which appellee was experiencing (R. 675). At a subsequent examination in the doctor's office, appellee had fainting spells

or seizures while there (R. 667, 690). Her reflexes progressively became worse (R. 669). Following carbon monoxide poisoning seizures are generally described as epileptic. Appellee will be required to be under a doctor's care the remainder of her life because of the toxic medicines which she is taking at a cost of approximately $25.00 per month (R. 693), and in addition thereto she will be required to take medicines which cost approximately seventy-five cents per day (R. 692, 693).

The diagnosis of Dr. Southcombe was positively confirmed by Dr. Connie I. Hood, who also specializes in the field of psychiatry and neurology, and who hospitalized the appellee on two different occasions as well as having made several office examinations (R. 618, 619, 620). Dr. Hood did an EEG study which proved abnormal and disclosed cerebral dysrythmia (R. 554, 558). Even Dr. Hale Haven, testifying on behalf of the defense, admitted the EEG disclosed dysrythmia (R. 1035). Dr. Hood also did a pneumoencephalogram, which constitutes the injection of air into the spinal cord, to eliminate the possibility of a brain tumor which was definitely ruled out (R. 574, 679, 582, 585, 601, 602, 683). Dr. Hood's unequivocal conclusion was and is that the appellee sustained carbon monoxide poisoning with neurological sequelae resulting in damage to the brain and central nervous system (R. 548, 586).

The appellee's father did not tell her the diagnosis which Dr. Southcombe had made in June of 1956 at that time because he didn't want to make it any harder on his family than he had to (R. 408). Notwithstanding the fact that appellee had been put on anticonvulsive drugs in the summer of 1956, she nevertheless sought and obtained employment with the General Electric Company (R. 408, 519). After appellee started working for General Electric Company she sought to have a renewal of her driver's license. The Washington State Patrol refused to issue her a driver's license after 1956 (R. 409, 798). She was no longer competent and capable of driving a motor vehicle on the public highway (R. 409, 291).

During the course of the trial appellee's testimony revealed her loss of memory and retrograde amnesia (R. 793, 794) and she also testified concerning her defect in talking, memory and concentration, and also as to her feeling of dizziness and headaches (R. 803, 804).

While appellee was employed at General Electric Company at Richland, Washington, Gayle Ryals noticed that she was unable to drink a coke or coffee without spilling it over her dress because she was missing her mouth (R. 269). Both Gayle Ryals and also another employee by the name of David Buel observed appellee fainting while at work which necessitated her having to be taken to the ladies' restroom (R. 263, 270, 272). This on occasions required appellee to be taken home

(R. 262, 263). Mr. Buel also observed her fainting or going into a seizure at the parking lot where he had his car parked (R. 262). They covered up for appellee at work (R. 801). She would run into such things as doors and also trip over things (R. 800). She also had fainting spells while at work (R. 800). She doesn't know when these spells are going to happen (R. 801). She was put on work restrictions; in other words, she couldn't be left alone over a half hour, she couldn't go up any stairs, and could not leave the building (R. 802). After she had a real bad spell at work they asked her for her resignation (R. 801). She didn't want to resign (R. 801). Finally she took a vacation and while she was gone on vacation her termination papers were made out by another person without her consent (R. 802, 274). Appellee was earning $73.30 during her employment with General Electric Company (R. 868).

Carbon monoxide gas is colorless, odorless and tasteless (R. 446). An inhalation of this gas by human beings will, among other things, frequently produce a sense of well-being (R. 739). It is agreed by all of the experts that the hemoglobin of the blood of human beings has an affinity for carbon monoxide at a ratio of 300 to 1 as compared to oxygen (R. 549, 670, 747, 923). A person who comes out of a room contaminated with carbon monoxide gas into the fresh air will suddenly collapse (R. 570, 755). This is due to the fact that the exertion of the individual requires more oxy-

gen to be furnished to the brain. The oxygen to the brain has been decreased and carbon monoxide has been substituted with the result that the brain does not receive an adequate amount of oxygen. Oxygen should be administered as quickly as possible (R. 570), and as a general rule, for every half hour exposure to carbon monoxide, two hours of administration of oxygen should be given (R. 571). It is also agreed among the experts that carbon monoxide contaminated air in the proportion of 2000 parts to one million, or one-fifth of 1%, would result in a blood saturation of 60 to 70% in one-half to three-quarters of an hour (R. 554, 555, 755, 766); that all persons are not affected in the same manner and to the same extent by carbon monoxide poisoning (R. 763). Younger people appear to be more susceptible to carbon monoxide poisoning (R. 771). Dr. Warner gave an example of this proposition by relating that in November of 1957 he had occasion to attend two young patients exposed to carbon monoxide gas while sitting in the back seat of an automobile for approximately two hours. One patient was unconscious when she arrived at the hospital and was resuscitated and revived, but the other one was dead upon arrival at the hospital (R. 738).

Carbon monoxide combines with the hemoglobin to the exclusion of oxygen (R. 549, 995) which results in anoxia or a deprivation of oxygen to the brain (R. 550, 996). Under such conditions, in a fleeting period of

time the brain sustains irreparable damage, because the brain cells and the spinal cord die due to the lack of oxygen and will not regenerate themselves, with the result that the injury sustained is permanent (R. 670, 671).

Carbon monoxide poisoning, as distinguished from the gas itself, is fairly easily determined by a medical man. It brings about headaches, pressure in the temporal area, the face is flushed; sometimes a sudden insult of carbon monoxide poisoning will bring about a pallid or waxy appearance in the skin (R. 742, 743); judgment is impaired giving one a sense of well-being, and in addition headaches and nausea will appear (R. 567, 687, 739). Continued exposure results in affected vision to blinding, difficulty in hearing, deafness, dizziness, and the muscles will become weak and collapse; nausea is evidence, and the respiration increases and becomes labored, rapid and deep, and will stop for a second or two (R. 740); the blood pressure will rise and the pulse accelerate; in severe cases the body temperature will rise and then drop (R. 746), as demonstrated in this case by Exhibit 64 (R. 970, 971) which is the hospital record at the Colfax Hospital.

Appellee's prognosis, according to the medical experts, will eventually result in Parkinsonism, which manifests itself in tremors, palsy and stumbling (R. 592, 690), and her present disability is from 75 to 90% (R. 593). She will be unable to do ordinary things

and to participate in ordinary activities and will have a poor memory (R. 577, 580, 583, 594, 716). There is no known medical cure for this condition and her disability will increase.

During the course of this trial appellee was noticed to be unsteady on her feet (R. 154, 178) and was unable to walk without holding onto someone. She went into a seizure and lost consciousness while walking on the street (R. 154, 191, 412). After she regained consciousness she was unable to remember events taking place immediately prior to her seizure (R. 155, 192, 534).

The bus involved in this litigation was propelled by a two-cycle engine which fires at every stroke of the piston (R. 1161). The back seat is so constructed so that there is a space between it and the rear of the bus, which space is covered by a plastic cover running crosswise (R. 1231, Ex. 68). The plastic covering in the bus involved in this litigation had a 16-inch tear on the rear lefthand side behind where appellee was seated on the 20th day of November, 1955 (R. 1232, 1258, 1259, 1276). The exhaust ports which contained the exhaust gaskets are situated immediately under the back seat (R. 1249), so that the exhaust escaping through the gaskets would rise upward into the space between the back seat and the back of the bus, in sort of a jet action, as described by the defense experts,

coming out into the passenger compartment through the torn plastic covering (R. 1155, 1250, 1254, 1255, 1256) at appellee's nose level (R. 1259, 1260). At this point reference is made to Exhibit 10, which shows that the appellant replaced the gaskets in the engine and also repaired the tail pipe of this bus the day after the accident here involved. Thus the appellee unknowingly was directly exposed to the exhaust fumes containing carbon monoxide before they had an opportunity to be diluted in the air in the atmosphere of the passenger compartment (R. 1260).

During the course of the trial when the bus was examined, a flashlight placed at the exhaust ports where the exhaust gaskets are located could be seen by looking down through the tear behind the back seat (R. 1264). The evidence further disclosed that improper combustion would result in more than the usual amount of carbon monoxide in the exhaust. As shown further by the evidence in this case, the engine on this bus was running hot.

The jury, after having heard the evidence which we have heretofore referred to, and also additional evidence which we will discuss more in detail in our argument, returned a verdict for the appellee. Appellant filed a motion for new trial which was argued and denied. This appeal then followed.

INSUFFICIENCY OF APPELLANT'S SPECIFICATIONS OF ERRORS

Appellee calls the court's attention to appellant's specifications of errors (App. Br. 10) and challenges the propriety and adequacy of the same.

Appellant's first specification of error is based upon the trial court's failure to grant the defendant's motion at close of plaintiff's case. Appellant did not rest upon its motion but introduced evidence (R. 825). Accordingly, this alleged error has been waived. *Mutual Life Insurance Co. of New York v. Wells Fargo Bank and Union Trust Co.*, 86 Fed. 2d 585 (C.C.A. 9).

Appellant's second specification of error claims the trial court erred in denying appellant's motion at the close of all the evidence. This specification of error does not particularize wherein the trial court erred. The reference in the second specification of error to the first specification of error for a basis of the specification of error does not comply with Rule 18 (2) (d) of this court.

Appellant's third specification of error does not particularize the error and improperly incorporates the reasons set forth in appellant's first specification of error. Rule 18 (2) (d).

Appellant's fourth specification of error fails to set forth the instruction which the trial court actually gave on res ipsa loquitur, which is required by Rule

18 (2) (d) of this court. Also, the exception taken (R. 1456) is too general. See *Woodworkers Tool Works v. Byrne*, 191 Fed. 2d 667 (C.C.A. 9).

The appellant's fifth specification of error violates Rule 18 (2) (d) of this court in several respects. First, it "packages" together three separate and distinct claims of error in one specification of error. This is contrary to the rule of this court, as well as its decisions. *Mutual Life Insurance Co. of New York v. Wells Fargo Bank and Union Trust Co.*, 86 Fed. 2d 585 (C. C. A. 9); *Kobey v. United States*, 208 Fed. 2d 583 (C. C. A. 9); *Thys Co. v. Anglo-California National Bank*, 219 Fed. 2d 131 (C.C.A. 9). It is to be borne in mind that contributory negligence and assumption of the risk are entirely separate legal doctrines and theories. *Walsh v. West Coast Coal Mines*, 31 Wash. 2d 396; 197 P. 2d 233. The question of mitigation of damages, which is sometimes raised, does not defeat recovery but only goes to the amount. This is referred to as avoidable consequences by the legal scholars and is a separate and distinct doctrine. See *Prosser on Torts*, 287 (1955 Ed.).

Furthermore, the appellant's exceptions at the time of trial to the court's refusal to give the instructions (15, 16 and 17) are only general exceptions (R. 1456) which is insufficient under Rule 51 of the Federal Rules of Civil Procedure. Furthermore, appellant did not except to the court's failure to give its instruction No. 14

(R. 1456) although the instruction is set forth in its fifth specification of error in its brief. Additionally, it should be noted that the appellant submitted an instruction on the issue of mitigation of damages (R. 41), which, of course, was refused but the appellant has failed to include this instruction in its brief in accordance with Rule 18 (2)(d) of this court. Under such circumstances, this court has held such alleged error would not be considered. *Shevlin-Hixon Co. v. Smith*, 165 Fed. 2d 170 (C.C.A. 9).

Appellant's sixth specification of error, which asserts the court erred in submitting to the jury the question of the bus driver's negligence is not properly before this court because this alleged specification of error is not contained in the statement of points on which appellant relies (R. 1465), which is required by the rules of this court, Rule 17 (6). Furthermore, the instruction which the court actually gave (R. 1442) is not set forth totidem verbis as required by Rule 18 (2) (d) of this court, and, further, the exception taken (R. 1457) is only in effect a general exception which does not comply with Rule 51 of the Federal Rules of Civil Procedure. *Shevlin-Hixon Co. v. Smith*, 165 Fed. 2d 170 (C.C.A. 9); *Woodworkers Tool Works v. Byrne*, 191 Fed. 2d 667 (C.C.A. 9). The exception actually taken by appellant (R. 1457) furthermore is ambiguous in that it does not state whether the instruction fails to set forth a standard of care or whether it is the

evidence which fails to establish a standard of care. Insofar as appellant complains that the bus driver's negligence was not covered in the pretrial order, it is to be pointed out that appellant in its exception (R. 1457) does not make any complaint of the bus driver's negligence not having been covered in the court's pretrial order. Accordingly, this alleged error has been waived. *Pennsylvania Greyhound Lines v. McKenzie*, 237 Fed. 2d 204.

The insufficiency and the inadequacy of appellant's specification of errors in the particulars heretofore pointed out and its failure to comply with the rules and decisions of this court will not again be reasserted in this brief. The appellee, without waiving the points made herein, will now answer the appellant's brief in the same order that appellant has argued its alleged errors.

ARGUMENT

I

THERE WAS NO FAILURE OF PROOF

Appellant contends the evidence failed to establish proof of negligence on its part (App. Br. 17).

Appellant (App. Br. 18) states that the driver was not notified of fumes until approaching Cashup, a short distance from Colfax. Testimony in the record refutes this and shows notice to the driver before reaching Rosalia (R. 118, 119, 131, 141). Contrary to the statement of appellant (App. Br. 18, 19) the bus stopped only twice. One stop was at Rosalia, which was a normal bus stop where he was waiting for Mr. Bailey, the following bus driver (R. 1119). Appellee and Karen Gilbertson got off the bus at Rosalia with other passengers (R. 119, 120, 228). The next and only other stop was in the vicinity of Cashup when appellee and Karen Gilbertson came forward because they were sick and the bus driver brought the bus to a stop, at which time appellee, upon going outside of the bus, fainted. (R. 1122, 1123, 78, 79, 120, 1093). The bus driver opened the windows in the bus after the appellee had been taken off the bus and fainted (R. 1122, 1123). He then opened every window in the coach that could be opened (R. 1120). Some windows could not be opened (R. 1123). Prior to this time the bus driver had opened the *one window beside him* and to his left when Pattie Murphy had come forward complaining of fumes and

sickness (R. 119). After appellee had fainted and began having convulsions, rapid breathing and appearing semi-conscious she never returned to the back of the bus (R. 1123).

Mr. Whitman, whom the appellant quotes (App. Br. 19) is quoted out of context. He testified that most of the people around him were complaining about the fumes (R. 1172). In appellee's statement of the case we have referred to the record which establishes beyond doubt that on the night in question this bus contained an excessive amount of fumes coming from the bus engine. We have established that other passengers noticed the fumes; some became sick, nauseated and had headaches. We have shown that appellee was unwittingly sitting on the back seat and in a precarious position, unkown to her, where the fumes were entering the coach (R. 1250, 1260).

Appellant's Own Records Establish The Bus Was Defective

It seems strange that appellant, nowhere in its brief has told this court that this bus on the night in controversy stalled on the highway between Colfax and Pullman, Washington, and had to be pushed (R. 86, 122, 233, 1101, 1102, 1137, 1189, 234). It was taken out of service and deadheaded back to Spokane. Appellant has not told this court that its own drivers reported the engine running hot and the fumes very bad and strong in the passenger compartment. (See Ex. 10.)

Appellant has not told this court that its own records show that immediately after this incident a new set of exhaust gaskets were installed and work was done on the tail pipe (Ex. 10). Appellee showed that if the tail pipe was restricted this could in turn cause a back force or pressure on the engine, causing the gaskets to blow and the engine run hot (R. 448, 1246, 1247). The motor gate on this bus was defective. (R. 1244). The bus had on a winter front which covered the radiator and thus cut off air to the motor (R. 1101). This would not allow fumes leaking from the engine to escape out through the defective motor gate. The fumes had to go somewhere; they did, into the passenger compartment.

Appellant's Subsequent Tests

Appellant argues tests made on the bus in question shortly before and at time of trial demonstrate carbon monoxide poisoning was impossible (App. Br. 30). The jury had a right to disregard them because they were not made under similar conditions:

1. When made the engine was not running hot (R. 1276).

2. The bus had only 8 passengers (R. 947) as contrasted to 37 plus one driver when appellee was injured. Obviously the amount of cubic air displaced by the additional passengers would cause a greater concentration of air in the bus compartment.

3. When the tests were made no one experienced nausea or headaches (R. 1162, 1163). On the night appellee was injured passengers were sick, nauseated, had headaches, et cetera.

4. At the time of the tests the exhaust pipe had been repaired.

5. The tests were not conducted in the exact spot and location where appellee was seated.

6. Tests were conducted at a different elevation (R. 945) and there was no showing the atmospheric pressure was the same.

7. There was no winter cover over the radiator of the engine at the time of the tests (R. 1276).

8. At the time of the tests the engine of the bus had just been overhauled in November, 1957 (R. 1263).

The foregoing demonstrates, we believe, that the jury was entitled to disregard the evidence of tests submitted by the appellant.

Nature of Carbon Monoxide Gas

Carbon monoxide gas is odorless, tasteless and colorless (R. 446). Exhaust from a diesel engine contains carbon monoxide gas in addition to the other gasses that do have a smell (R. 471). Dr. Freeman, called by appellant, testified that his experience showed that people received carbon monoxide poisoning from diesel engines (R. 976, 977). This gas affects people different-

ly (R. 763). Young people who are small and active are more susceptible to this poisoning (R. 771, 688). Appellee is young, small, and was active prior to her injury.

Medical Testimony

Carbon monoxide poisoning immediately affects judgment and gives one a sense of well-being (R. 569, 739). It causes dizziness, headaches and nausea and impairs memory (R. 739, 740, 567, 674). The damage as the result of carbon monoxide poisoning is immediate; however, it takes time for the residuals to appear (R. 587, 739) with the result that people exposed must be watched for a minimum of one year (R. 739) and it is even possible for residuals to appear ten to fifteen years afterwards (R. 998).

The Cheynes-Stokes respiration is one where the person has an irregular respiration where they breathe three or four times or so and then stop breathing, and then breathe again; in other words, the respiration is very irregular with pauses between it (R. 614, 615). This is apparent in the early stages of carbon monoxide respiration (R. 615). Compare the testimony of Mr. Wheaton, who observed appellee on the bus after she had been placed in the front, where he said, "She got consistently worse. Then as she got worse, she then began gasping for air. There would be periods when she would hold her breath" (R. 230). To the same ef-

fect, see testimony of appellant's witnesses, Janet McBride (R. 1342) and Judy Evans (R. 1346). The reason for this type of breathing is because the brain does not get sufficient oxygen (R. 615). Dr. Warner also described the Cheynes-Stokes respiration as a definite sign of carbon monoxide poisoning (R. 740).

Both Dr. Southcombe and Dr. Hood, who have attended appellee, diagnosed her condition as a direct result of carbon monoxide poisoning with resulting sequelae (R. 667, 548, 586). Appellee's damage is permanent (R. 592, 690, 593, 577, 580, 583, 594, 716). Drs. Harris, Warner, Southcombe and Hood all testified that the x-rays which have been introduced in evidence disclosed that appellee now has atrophy of the brain (R. 681, 599, 750, 719).

The negligence of the appellant need not be established by direct evidence, but like any other fact may be proven by circumstantial evidence. *Johnson vs. Griffith's S. S. Co.*, 150 F. 2d 224, (C.C.A. 9), *Myers vs. Little Church by the Side of the Road*, 37 Wn. 2d 897, 227 P. 2d 165, *Nelson vs. West Coast Dairy Co.*, 5 Wn. 2d 284, 105 P. 2d 76. It is not incumbent upon the appellee to establish its case against the appellant beyond a reasonable doubt. In *St. Germain vs. Potlatch Lumber Co.*, 76 Wash. 102, 135 Pac. 804, the Supreme Court of the State of Washington said:

> "A plaintiff in this character of case is not obligated to establish the material facts essential to a

> recovery beyond a reasonable doubt. Such a rule would amount to a denial of justice."

An examination of the cases cited by appellant in its argument will disclose that factually they do not have the foundation such as has been established by the facts developed in the case at bar. Accordingly we deem it unnecessary to discuss them further.

Appellee desires the court in considering this matter to also consider the next section of appellee's brief dealing with the doctrine of res ipsa loquitur which appellee contends, and the trial court so held, is applicable to the facts in the case at bar. Also, we desire to have the court consider the question of the negligence of the bus driver, which is treated separately in this brief as well as in appellant's brief.

It is submitted that the trial court properly denied appellant's motions and submitted the question of the appellant's negligence to the jury.

II

THE DOCTRINE OF RES IPSA LOQUITUR IS APPLICABLE TO THE FACTS

The appellant argues (App. Br. 33) that the court erred in submitting this case to the jury on the theory of res ipsa loquitur. With this contention appellee obviously disagrees.

The doctrine has recently been stated in *Kind vs. Seattle*, 50 Wn. (2d) 485, 312 P. (2d) 811, as follows:

> "Where a plaintiff's evidence establishes that an instrumentality under the exclusive control of the defendant caused an injurious occurrence, which ordinarily does not happen if those in control of the instrumentality use ordinary care, there is an inference, permissible from the occurrence itself, that it was caused by the defendant's want of care. *Nopson v. Wockner*, 40 Wn. (2d) 645, 245 P. (2d) 1022. Legal control or responsibility for the proper and efficient functioning of the instrumentality which caused the injury and a superior, if not exclusive, position for knowing or obtaining knowledge of the facts which caused the injury, provide a sufficient basis for application of the doctrine. *Hogland v. Klein*, 49 Wn. (2d) 216, 298 P. (2) 1099. When these circumstances are shown, the plaintiff has made a *prima facie case*, and it devolves upon the defendant to produce evidence to meet and offset the effect of the presumption. *Hogland v. Klein, supra*."

The Doctrine of Res Ipsa Loquitur has been applied in the case of a passenger who jumped from defendant's streetcar when an explosion on the streetcar took place. The court held that the doctrine was partic-

ularly applicable in common carrier cases. *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 82 Pac. 995.

The case was approved with many additional citations in the case of *Hayes vs. Staples*, 129 Wash. 436, 225 Pac. 417.

The Doctrine of Res Ipsa Loquitur has been held applicable in cases against common carriers by reason of injuries due to carbon monoxide poisoning. *Thomas v. Kansas City Public Service Co.* (Mo.) 289 SW (2d) 141, wherein the court stated:

> "This is a res ipsa loquitur case. The court will judicially notice the fact that the presence, in injurious quantities of carbon monoxide gas within defendant's bus bespeaks negligence."

See also *McLean vs. Missouri Pacific Transportation Company*, (Ark.), 187 SW (2d) 727, and also *Coastal Coaches vs. Ball*, (Texas), 234 SW (2d) 474, 22 A. L. R. (2d) 955. In the latter case the appellant argued much as the appellant in the case at bar argues. The court in that case stated:

> "The appellant argues that there is no competent testimony that the appellee suffered from any carbon monoxide fumes and says that the appellee's 'whole case as to being gassed is founded purely on hearsay testimony, that is to say, what other persons told him had happened to him'. While, of course, the appellee did not know the name of the chemical compound of a gaseous nature which affected him while riding on the bus, there is no question that he did suffer from exhaust fumes in the bus. The appellee established by the testimony of a chemist that carbon monoxide is contained in

> the exhaust fumes of motor vehicles and both physicians who testified established that the appellee had suffered physical injury as the result of carbon monoxide poisoning. While it is true that there were some statements made to appellee to the effect that he had been gassed, this fact does not detract from but rather adds to the other evidence in the record tending to prove that Ball in fact was injured by the inhalation of carbon monoxide gases. We think it of some significance that the bus driver himself, after the trip was resumed from High Island to Galveston, in a substituted bus, told Ball that he had been gassed and that he should get as much fresh air as possible. It is also of some significance that the bus driver did not proceed on the remainder of his journey from High Island to Galveston in the bus in which Ball had been riding to High Island but secured another bus from his company, because, as he testified, 'he was afraid someone else might get gassed'."

Although appellee in the case at bar submits that her case is stronger, yet it is obvious from the above quotation that there are a number of similarities.

Without restating the record, but referring to appellee's statement of the case and also appellee's argument that there was no failure of proof, it is submitted that this is a typical res ipsa loquitur case and that appellant did not overcome the prima facie case made against it. Appellant's own evidence, Exhibit 10, shows there were fumes in the bus in addition to the testimony of numerous passengers. The appellant's experiments even disclosed that there was carbon monoxide in the bus. We believe that these experiments were not conclusive because they were not conducted under the

same circumstances as we have heretofore pointed out. The jury by its verdict necessarily so concluded.

The trial court in ruling upon the applicability of the Doctrine of Res Ipsa Loquitur, properly observed that passengers boarding a common carrier bus do not carry along testing machinery to test the content of the air (R. 817). And there was sufficient testimony in this record to submit the same to the jury for its ultimate decision as to the facts and render a verdict thereon (R. 816). We submit that the Doctrine of Res Ipsa Loquitur applies and that appellee has a much stronger case than many of the ordinary cases where the Doctrine of Res Ipsa Loquitur is held applicable.

III

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT ON CONTRIBUTORY NEGLIGENCE, ASSUMPTION OF RISK AND MITIGATION OF DAMAGES

Appellant's fifth specification of error (App. Br. 11) asserts the trial court erred in refusing to instruct on contributory negligence, assumption of risk and mitigation of damages. The first paragraph (App. Br. 37) contains statements contrary to the record. Appellee did not move to withdraw the alleged issue of mitigation of damages from the jury. It was appellant who raised this point, (R. 1420) and the court stated (R. 1421):

> "But if, as is shown by the undisputed evidence here, the doctor tells a patient, 'you have got hysteria, you haven't got carbon monoxide; if you have any further trouble let me know', wouldn't she have a right to believe that any further symptoms she had was the hysteria rather than the carbon monoxide?"

At that time counsel for appellant said:

> "I think so. Well, those are the points."

(R. 1421) Also contrary to the statement of appellant, (App. Br. 37) the court did not instruct the jury specifically withdrawing the issue of mitigation of damages from its consideration (R. 1456).

The Question of Mitigation of Damages

Appellant's argument (App. Br. 37-40) omits much of the actual record of this trial. Dr. Freeman, (whose diagnosis the jury obviously did not believe in view of the other medical testimony), diagnosed appellee's condition as hysteria (R. 983). The doctor simply made a mistake in his diagnosis. It is not unusual to find a reputable doctor making a mistake in his diagnosis of a case. The appellant in its brief does not claim that Dr. Freeman was a quack or charlatan and neither does appellee. Certainly appellee had a right to believe the diagnosis of Dr. Freeman even though it was wrong. The appellant even admits that the appellee had a right to rely upon Dr. Freeman's diagnosis. We must bear in mind that the appellee is a young girl, not a doctor. In approximately thirty days from the time appellee was seen by Dr. Freeman, she then went to Dr. Freund in Pasco, Washington, for an examination (R. 1131). Dr. Freund is a general practitioner and a reputable doctor. Even appellant admits this in its brief. There is no claim that the appellee had no right to rely upon his medical conclusion. It should be pointed out that Dr. Freund was frank enough to admit that he did not have an electroencephalogram and that he was a general practitioner and not an expert, but recommended seeing a specialist if the trouble persisted (R. 1134). As appellee's condition continued to worsen, she ultimately went to a specialist in Spokane, Wash-

ington, approximately eighty miles from school. This was Dr. Southcombe, a neurologist and psychiatrist, a man eminently qualified in his field and former superintendent of the Washington State Hospital. Dr. Southcombe examined appellee on May 7, 1956 and took a history (R. 665), and also had an electroencephalogram taken (R. 697). Dr. Southcombe at that time could not come to any definite conclusion, but decided that more investigations were necessary. Again on June 13, 1956, at the request of Dr. Southcombe, the appellee was hospitalized, a spinal puncture was done, as well as x-rays of her skull (R. 666). It was not until after all of this examination that Dr. Southcombe finally came to the medical conclusion that the appellee was suffering from an organic encephalopathy as a result of a toxin, specifically, carbon monoxide, which was manifesting itself in convulsive phenomena (R. 667). Appellant has offered no evidence that Dr. Southcombe was incompetent or not a qualified man in his specialty. Certainly appellee had the right to rely upon Dr. Southcombe.

The evidence in this record stands uncontradicted, that once a person has been subjected to carbon monoxide poisoning an injury has occurred. The result is permanent and there is no medicine in the world that can undo the damage and injury caused (R. 671, 741). The anticonvulsant drugs that were prescribed for appellee (R. 675) do not repair any brain damage or damage

that has been done to the nervous system. They are simply given to reduce the irritability of the cerebral cortex (R. 695) and at first they didn't even do that (R. 695). These drugs have to be increased (R. 697). Even after Dr. Southcombe had arrived at his diagnosis of the appellee, nevertheless appellee went on and obtained employment at the General Electric Company at a time when she was under the doctor's care and taking the drugs prescribed. As shown by this record the drugs did not prevent the seizures or fainting spells. They did not restore her memory, nor did they restore her balance or coordination.

It is submitted that the appellant has utterly failed to point out in any respect whatsoever what the appellee could do or should do in order to mitigate damages. Her condition will become progressively worse even though she continues to take the medicines, because by the very nature of the injury that she sustained medicines will not regenerate brain cells or that part of the nervous system that has been destroyed. We submit that the appellee has, in every respect, acted as a reasonable and prudent person under the circumstances and that the trial court was proper in refusing to give the appellant's requested instruction on mitigation of damages. It would have been prejudicial error for the trial court to instruct the jury on this issue, because there was no substantial evidence that appellee did or failed to do anything that would have

mitigated the damages she sustained. *Leavitt v. DeYoung*, 43 Wn. (2d) 701, 263 P. (2d) 592 and cases cited therein.

Trial Court Properly Withdrew Alleged Contributory Negligence From Jury

Appellant in its fifth specification of error also asserts the court erred in withdrawing the issue of contributory negligence from the jury. Contributory negligence and assumption of risk are considered distinct legal doctrines in the State of Washington. *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P. 2d 233. The burden is upon the defendant (appellant) to plead and prove by substantial evidence that the plaintiff was guilty of contributory negligence. *Kingwell v. Hart*, 45 Wn. 2d 401, 275 P. 2d 431. The scintilla of evidence rule is not recognized and unless a party adduces substantial evidence in support of the contention, there is no issue for the jury. *Evans v. Yakima Valley Transportation Co.*, 39 Wn. 2d 841, 239 P. 2d 336. *Neel v. Henne*, 30 Wn. 2d 24, 190 P. 2d 775. It is reversible error to instruct the jury upon an issue which is not supported by substantial evidence. *Leavitt v. DeYoung*, 43 Wn. 2d 701, 263 P. 2d 592. *Rathke v. Roberts*, 33 Wn. 2d 858, 207 P. 2d 716. *Hanford v. Goehry*, 24 Wn. 2d 859, 167 P. 2d 678. In accordance with the foregoing principles it has been held reversible error to submit the issue of plaintiff's contributory negligence to the jury without substantial evidence to

support the same. *Schneider v. Midwest Coast Transport Inc.*, 151 Wash. Dec. 634, 321 P. 2d 260. See also *Jackson v. Seattle*, 15 Wn. 2d 505, 131 P. 2d 172, where Judge Driver (who was the Federal trial judge in this case), speaking for the Supreme Court of the State of Washington, sets forth the duties of a common carrier and held that the trial court erred in submitting the issue of plaintiff's contributory negligence to the jury because there was no substantial evidence to sustain the same.

Appellant says, "Nevertheless neither she (referring to appellee) nor any of the girls complained to the driver until three-quarters of the way to Pullman just shortly before they got to Colfax." (App. Br. 40) This statement utterly disregards the testimony of Pattie Murphy who stated positively she advised the bus driver of the fumes before they reached Rosalia (R. 118, 119, 131, 141), which was corroborated by Karen Gilbertson (R. 77, 78).

Appellant says, "Since some of the people moved forward or opened the windows before Miss Blakley did, there obviously was room for reasonable minds to differ * * *." (App. Br. 43) This statement is not supported by the record, which is directly to the contrary. The first window opened was by the bus driver (R. 119) when Pattie Murphy came forward in the bus and complained (R. 119, 120). The windows in the back of the bus where the girls were seated would

not open (R. 77, 81, 118). When the bus stopped in the vicinity of Cashup and appellee was removed therefrom and fainted, the driver then opened all the windows that could be opened (R. 1120, 1122, 1123). The passengers in the bus did not move forward until appellee had been taken off the bus and sent to the hospital and the bus was traveling from Colfax to Pullman (R. 86, 121).

The trial court in determining whether the issue of appellee's alleged contributory negligence should be submitted to the jury had the right to consider the fact that appellant was a common carrier and owed to its passengers a very high degree of care. *Jackson v. Seattle*, 15 Wn. 2d 505, 131 P. 2d 172. The court further had the right to consider that appellee as well as the other passengers on the bus were entitled to assume that the bus and all of its equipment were reasonably safe and that the appellant had taken all necessary precautions for the safety of its passengers. *Jenkins v. Kansas City Public Service Co.*, 127 Kan. 821, 275 Pac. 136, and that there was no duty on the part of the passengers to make an inspection of the common carrier equipment. *Chicago R. I. & P. Railroad Co. v. McCrary*, 179 Ark. 444, 16 SW 2d 466. The court further had the right to take into consideration the presumption in favor of appellee that she was in the exercise of due care and would take reasonable and necessary steps to protect herself, and this is espe-

cially so because the injuries she suffered destroyed her memory of all things that transpired on the bus trip (R. 793, 414, 289, 567). Cf. *Geer v. Gellerman*, 165 Wash. 10, 4 P. 2d 641. The court had the right to consider that both Pattie Murphy and Karen Gilbertson, who were accompanying appellee, positively testified, and without contradiction, that they did not know the effects of the fumes that were being emitted into the passenger compartment of the bus (R. 77, 118). The court had the right to consider the conduct of all of the other passengers in the bus who smelled the fumes, had headaches and became nauseated and the fact that they likewise did nothing until after the appellee had been let out of the bus in the vicinity of Cashup and fainted. Their conduct, which speaks louder than words, discloses that they did not consider the fumes would do them any damage. It appears to appellee that this is about as fine a test as one could possibly have for determining what the reasonable, normal human being would do under like or similar circumstances; they were there, and subject to the same situation that confronted appellee. It was not until after appellee had become ill and went forward and notified the bus driver who thereupon stopped the bus, that anyone appears to have started to become concerned. Appellee as well as the other passengers in the bus are held to only that degree of care which is exercised by an ordinarily prudent person generally, and not that of an expert. *Morrison v. Lee*, 16 N.D. 377, 113 NW

1025, 13 L.R.A. (N.S.) 650. What other people did or failed to do under the same circumstances and the same time as appellee is a matter properly considered. In *Twomley v. Central Park etc. Railroad Co.*, 69 N.Y. 158, 25 Am. Reports 162, a number of passengers jumped from the defendant's car when it appeared that there was an impending peril which later proved not to be the case. The court there said,

> "Evidence of the action of other passengers was competent as part of the res gestae, and also as evidence of what was deemed prudent by those in the same situation * * *."

The court also had the right to take into consideration the fact that carbon monoxide is an odorless, tasteless, colorless gas (R. 446), and this has even been judicially stated. *Laughlin v. N.Y. Power and Light Co.*, 23 N. Y. S. 2d 292, 294. It cannot be detected by the senses. The fumes which were smelled in the bus were the oxides from the exhaust of the diesel engine. Of course these fumes carried a lethal gas. Passengers boarding buses do not carry instruments which are necessary to detect and measure carbon monoxide gas. The record in this case discloses the technical instruments which are required.

The court had the right to take into consideration the undisputed testimony that carbon monoxide gas affects people differently (R. 763) and that young people are more susceptible to this poisoning (R. 771, 688), and that the gas itself affects the judgment or

intelligence of those subjected to it and gives them a sense of well-being (R. 569, 739) and people affected by carbon monoxide poisoning will fail to take measures to protect themselves (R. 739, 569) because of the very nature of the poisoning. This testimony is undisputed in this record. In other words, considering the record in this case and the medical testimony, should the appellant be allowed, by reason of its negligence, to create a perilous situation in one of its passenger buses, traveling down the highway on a cold, dark November night, and then take advantage of someone, and particularly the appellee, and assert that appellee, who was the victim of their own negligence, should have acted differently? The very nature of appellant's negligence affected the appellee's judgment; can it now honestly complain about her conduct? It seems to appelle that it is like chloroforming someone and then complaining because they are asleep. Appellee sincerely believes, as did the trial court, that under the circumstances the undisputed evidence shows that appellee has met the standard of care required of her, and that reasonable minds cannot differ in arriving at the conclusion that she did.

In view of the record in this case there is no substantial evidence that would have justified the trial court in submitting the appellant's proposed instructions to the jury on the doctrine of contributory negligence.

Doctrine of Assumption of Risk Is Inapplicable

Appellant's fifth specification of error also complains of the trial court's failure to instruct on the doctrine of assumption of risk. Appellant's Proposed Instruction No. 17 (App. Br. 13) embraces the doctrine. Confusion among the cases exists because the term "assumption of the risk" is given different meanings. The Washington Supreme Court has held that the doctrine of assumption of risk applies in the master and servant relationship while its counterpart, namely the doctrine of volenti non fit injuria applies in other relationships. *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P. 2d 233. In accordance with Washington law, we will discuss appellant's alleged error as involving the legal doctrine of volenti non fit injuria. This doctrine is defined in *Walsh v. West Coast Coal Mines*, 31 Wn. 2d 396, 197 P. 2d 233, as follows:

> "If one knowing and comprehending the danger voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery from an injury resulting therefrom. The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent thereto."

In *Emerick v. Mayer*, 39 Wn. 2d 23, 234 P. 2d 1079, the court said:

> "In order to invoke the doctrine, it is essential that the plaintiff exposed himself or his property voluntarily. The doctrine can apply only where a person may reasonably elect whether or not he shall expose himself to a particular danger. Also,

> it is essential that the risk of danger shall have been known to, and appreciated by, the plaintiff or that it shall have been so obvious that he must be presumed to have comprehended it."

Professor Prosser on Torts, 1955 Ed., p. 309, says:

> "Ordinarily the plaintiff will not be taken to assume any risk of conditions or activities of which he is ignorant. Furthermore, he must not only know of the facts which create the danger, but he must comprehend and appreciate the danger itself. 'A defect and the danger arising from it are not necessarily to be identified, and a person may know of one without appreciating the other.' If because of age, or lack of information or experience, he does not comprehend the risk involved in a known situation, he will not be taken to consent to assume it."

Professor Prosser further states (Prosser on Torts, 1955 Ed., p. 312):

> "The risk is not assumed where the conduct of the defendant has left the plaintiff no reasonable alternative. * * * By placing him in the dilemma, the defendant has deprived him of his freedom of choice, and so cannot be heard to say that he has voluntarily assumed the risk."

From the foregoing it would appear that the doctrine can only be applied (1) if the plaintiff has freely and voluntarily consented to expose himself to the defendant's negligence, voluntarily meaning that the defendant's conduct has left the plaintiff a reasonable election or alternative, and (2), was the risk of danger known to and appreciated by the plaintiff? *Kingwell v. Hart*, 45 Wn. 2d 401, 275 P. 2d 431.

Applying the foregoing principles to the record in the case at bar, there is no evidence in this record, or even a reasonable inference therefrom, that appellee voluntarily consented to expose herself to carbon monoxide poisoning. When she became a paying passenger on appellant's common carrier bus at Spokane, Washington, she had a right to assume that appellant had performed its duty and that the bus was reasonably fit and safe for passengers. The situation as it subsequently developed as the bus traveled down the highway did not give her a reasonable election or an alternative. She was deprived of her freedom of choice as well as the other passengers in the bus who by their conduct also demonstrated that none of them consented to be made ill and nauseated from the fumes in appellant's bus. Secondly, there is no evidence in this record that appellee knew of and appreciated the danger of the risk involved. Again the conduct of the other passengers in the bus undergoing the same exposure to fumes would seem to clearly indicate that they did not know of and appreciate the danger of risk involved.

A passenger on a common carrier does not assume the risks of the carrier's negligence but has a right to assume that the carrier's employees will not be negligent and that all necessary precautions will be taken for their safety. *Central R. Co. of N. J. v. Hirsch*, 223 F. 44 (CCA 3); *Toroian v. Parkview Amusement Co.*, 331 Mo. 700, 56 SW 2d 134, 13 CJS, Carriers, p. 1545;

and annotations contained in Vol. 10, CJ, p. 1098, Note 44.

The burden of proving this defense of assumption of risk or volenti non fit injuria is upon the defendant. *Kingwell v. Hart*, 45 Wn. 2d 401, 275 P. 2d 431. Where the evidence does not warrant the giving of an instruction to the jury covering this doctrine, it is prejudicial to give to the jury such an instruction. *Anderson v. Rohde*, 46 Wn. 2d 89, 278 P. 2d 380.

It is submitted that when this whole record is considered it will disclose an absence of substantial evidence which would have warranted the trial court in giving the instruction requested by the appellant. Accordingly, we submit the trial court did not err in refusing appellant's Instruction 17.

IV

THE DAMAGES AWARDED BY THE JURY ARE NOT EXCESSIVE

Appellant argues that the jury by its verdict awarded excessive damages (App. Br. 44). In accordance with the decision of this court in *Southern Pacific Co. v. Guthrie*, 186 F. 2d, 926 (C.C.A. 9) it is incumbent upon appellant to demonstrate the verdict was monstrous or grossly excessive and that the trial court abused his discretion in refusing to grant the appellant's motion for a new trial based upon the claimed excessive verdict.

At the outset we desire to call the court's attention to some of the statements made by the appellant (App. Br. 44-59). There is no evidence in the record that this is one of the largest verdicts ever returned in this area. Even if it were, what difference does it make so long as the verdict is sustained by substantial evidence. Appellant misstates the record when it tells this court that "Both Dr. Southcombe and Dr. Hood admitted that they had seen or observed none," referring to appellee's attacks or seizures. Dr. Southcombe testified she had three petit mal attacks in his presence and that she was becoming more emotional and unpredictable (R. 690). Dr. Hood had appellee observed at the hospital. This disclosed that she had trouble walking, trouble eating, and with putting utensils and a cup to her mouth (R. 615, 616). Dr. Hood observed that the appellee had

trouble in her speech and blocking of her thought (R. 635). He determined that there was unsteadiness and lack of balance (R. 636). Even appellant's counsel witnessed one of appellee's fainting spells or seizures which occurred when her pretrial deposition was taken (R. 411, 419).

Appellant quotes from the testimony of its expert, Dr. Hale Haven, (App. Br. 27). Appellant failed to disclose to this court that Dr. Haven found the EEG disclosed dysrythmia (R. 1035). Appellant failed to tell this court that Dr. Haven would neither confirm nor deny a diagnosis of epilepsy (R. 1009, 1010, 1034); that Dr. Haven thought there was possibly something wrong with the appellee (R. 1027), and that "There might be a few cells knocked out," (R. 1030).

Appellant quotes Emma Lou Hoover (App. Br. 45-51) but omits that this witness testified that appellee was brought home from work because of headaches (R. 1063) and that appellee was brought home from work on a number of occasions which she could not remember (R. 1062) and that Emma Lou Hoover knew that appellee was taking medicine contained in a little bottle of white pills located in the medicine cabinet (R. 1072). Walta Lee Hoover knew that appellee was taking pills (R. 1079) and knew that appellee was having headaches (R. 1080, 1081) and further knew that her folks did not want her to drive a car (R. 1084).

Appellant refers to the testimony of Jo Ann Hodges (App. Br. 52) and Noreen Anderson (App. Br. 53). The testimony quoted is taken out of context. An examination of all of the testimony of both of the witnesses will disclose that the appellee was having very definite trouble as the result of the carbon monoxide poisoning and that it was becoming progressively worse. Furthermore as we have pointed out, the initial damage or injury to appellee is permanent, but it takes a considerable time for the residuals to manifest themselves (R. 739, 741).

Appellant sets forth a letter admittedly written by Jeanie Blakley with the advice and consent of her counsel (App. Br. 56). We have pointed out, the appellee did not voluntarily resign from her position at General Electric Company. The termination papers were made out while she was on her vacation and she had nothing to do with it. She was on restricted work duty; she could not be left alone, she could not walk up stairs. Obviously General Electric did not want an employee that they had to chaperon while on work duty.

Appellant complains because appellee did not call her boss as a witness. If appellant thought that appellee's boss would help in disproving the appellee's disability, the appellant would have been the first to bring him into court. It is evident from the record in this case that the appellant has spared no amount of money in bringing witnesses from all over the country.

Appellant quotes Mr. Buel (App. Br. 57, 58). Appellant lifts his testimony out of the record but fails to disclose all of Mr. Buel's testimony, which paints an entirely different picture than appellant would have this court believe. For example, Mr. Buel testified that when appellee was first employed she was a good worker, did a good job; later she tended to become more absent from the job (R. 261); that he had to take her home when she was ill, and that she apparently fainted while he was unlocking his car (R. 262); one time she fainted and fell to the floor and he assisted her (R. 263). Appellee was taken home from work on other occasions because she wasn't feeling good (R. 267). Mr. Buel also noticed her memory work and that it was not good. He attributed this to business, but on the other hand Mr. Buel did not know the medical diagnosis of appellee's condition (R. 266). A co-worker, Gayle Ryals, noticed appellee spilling coke upon her person, and it happened more than ordinary (R. 269). She observed appellee sleeping during the noon hour (R. 270), that appellee was having terrific headaches (R. 271). The testimony of Gayle Ryals, when considered in its full light, will disclose why appellee was terminated from General Electric. Mr. Rose, the boss of appellee, had a conversation with Miss Ryals concerning the appellee's health, and after this conversation appellee was terminated (R. 274).

The jury's verdict of $78,097.50 is not grossly excessive or monstrous, but is conservative.

The pretrial order claimed a total of $490.55 for medical expenses prior to the time of trial. The evidence disclosed the medical expense was actually in excess of $900.00 (R. 904). The trial court and counsel for appellee discussed the matter and it was agreed that although the evidence showed a greater amount of damages up to the time of trial, that appellee would be bound by this pretrial order rather than seek an amendment which might result in the appellant claiming surprise (R. 905). The court did allow an amendment claiming seventy-five cents a day for medicines required by appellee (R. 906). Dr. Southcombe, one of appellee's attending physicians, disclosed that the medicines appellee would be required to take for the remainder of her life cost seventy-five cents per day (R. 693). This testimony is uncontradicted. This would amount to $22.50 per month. The medical testimony is undisputed that by reason of the fact appellee was taking a highly dangerous medicine she would be required to be under the constant observation of a physician once a month who would have to take blood tests and make a physical examination to regulate the amount of her medicine. The fair and reasonable cost of this charge for medical attendance was the sum of $25.00 per month (R. 693). Adding the cost of medicines and the cost of medical attention results in a

total cost of $47.50 per month for the remainder of appellee's life. Appellee's life expectancy was 47.43 years (R. 1450). Translating the life expectancy of appellee into months gives a figure of 529.16 months. Multiplying this times the figure of $47.50 per month gives a total of $25,135.10.

Appellee at the time of her discharge or termination from General Electric was earning the sum of $73.30 per week (R. 868). Taking her life expectancy of 47.43 years and multiplying this by 52 gives a total of 2,465.36 weeks. This will establish a loss of future earnings in the sum of $188,106.96. Now that figure has not been reduced to its present value. However, appellant took no exceptions to the instructions on damages and no evidence was introduced on the matter of the present value of the loss of future earnings. The appellant is in no position to complain in that regard. However, cut the figure in half, and cut the medical expenses that this appellee will have to incur in the future in half, and you still have a justification for a verdict in excess of $100,000.00 The fallacy in reducing appellee's damages to present value in the case at bar is the fact that this girl is only beginning her working life. If one considers her background and what she was before this accident, it is quite obvious that this girl had a real future. It is just as reasonable to suppose in later years that she would have been earning more than she was earning at General Electric. This too

should be taken into consideration. Very few people set the standard of their future earnings by that which they earn when they are approximately twenty years of age. The earning prime of man does not generally arrive until he is approximately forty to fifty years of age.

What we have discussed heretofore is somewhat in the nature of special damages and does not even take into consideration the compensation to which appellee is entitled because of her disability; that is, to be a normal human being. She has lost her sense of balance and is unsteady on her feet (R. 636, 410). Her muscular coordination is materially affected (R. 269). She has petit mal seizures which occur at all hours of the day or night, and during these momentary lapses she blacks out wherever she may be, whether walking, driving, or attempting to work (R. 410, 411, 291). She has a loss of memory (R. 289, 414). She had and adverse personality change (R. 145, 569, 691). She has halting speech (R. 415). She has constant headaches (R. 185, 271). The spectacles of these attacks which appellee suffers are vividly presented in the record (R. 411, 271-2, 262, 191, 539-540). These cause her humiliation and embarrassment. Prior to her injury she was athletic and a good swimmer. Obviously she is no longer in a position to do the things that she used to do. These things were all brought before the jury, who rendered their verdict. Exclusive of the medical expense as well

as her loss of earnings, it is submitted that in view of the fact that this young lady is between 75 and 90% disabled, and in view of the fact that the undisputed medical testimony discloses that she will eventually develop what is known as a Parkinson's disease or palsy, a verdict of $50,000.00 for this condition alone would, we believe, be entirely reasonable. We submit that the verdict is in no wise excessive or monstrous, and that the trial court did not err in denying appellant's motion for a new trial.

V

NEGLIGENCE OF THE DRIVER

Appellant's specification of error No. 6 (App. Br. 13) asserts that the court erred in submitting to the jury the question of the bus driver's negligence.

The itinerary of the bus was Spokane through Spangle with a short normal passenger stop at Rosalia which is thirty-three miles from Spokane, through Thornton, and a stop on the highway at Cashup or in the vicinity of Cashup, (R. 1093, 1107, 1108) (Ex. 52) where appellee was taken out of the bus for fresh air and fainted. The testimony of Pattie Murphy, who was originally seated in the back of the bus, positively states that she went forward in the bus and complained to the bus driver of being sick and that the fumes in the bus were bad before the bus had reached Rosalia, (R. 118, 119, 131, 141) and the driver gave her something to sit on in the aisle of the bus (R. 119, 141). She told the driver that she could not get the window open (R. 141). The driver admitted remembering a girl coming to the front of the bus and giving her his air cushion (R. 1110). He claimed that this was after they had reached Rosalia (R. 1111). This is contrary to the testimony of not only Pattie Murphy but also of Karen Gilbertson (R. 77, 78). Further, it was mentioned to the bus driver at Rosalia that the fumes were bad (R. 79). The bus driver admitted he did not go back in the bus compartment at Rosalia (R. 1119).

Examination of the testimony in this record will disclose that the fumes in the bus were noticed by the passengers around Spangle and in the vicinity of Rosalia. Apparently everyone but the bus driver was aware of the fumes. It seems strange that he had no knowledge of any fumes in that coach (R. 1110). Compare testimony of Mary Fulseth, one of appellant's witnesses, who sat in front of bus just three seats behind driver, who smelled fumes and who was bothered with them and put her head scarf to her face (R. 1195), and further, there was talk on the bus about fumes (R. 1198). The driver was aware of the fact that fumes in the passenger compartment constitute a danger (R. 1119). He said that if the fumes were serious enough that he would not take the bus an inch (R. 1125). He also said that if you have any complaints, you don't use the bus (R. 1126). He is familiar with carbon monoxide, which is very dangerous in the passenger compartment (R. 1135).

Mr. West, who is a safety engineer for General Electric on the Hanford Project, (R. 438) has under his charge approximately 200 buses, plus 2,000 sedans and pickups (R. 438). The buses under his jurisdiction are diesel powered, (R. 439) and he is familiar with the safety precautions which are necessary in the operation of these buses. He is also familiar with carbon monoxide, which is an odorless, colorless and tasteless gas (R. 446). If there is a leak of carbon monoxide or an ex-

haust leak, the bus is taken from the trip (R. 482). If there were any exhaust fumes in the bus, the passengers would be immediately evacuated (R. 485) and the bus would be stopped immediately (R. 485).

From the foregoing testimony it is clear that an issue of fact was made for the jury as to whether the bus driver should have stopped at Rosalia and taken the bus out of service because of the complaints made by Pattie Murphy, and which the bus driver would have known had he investigated. Certainly, the bus driver, who was familiar with carbon monoxide poisoning and its dangerous qualities, could not continue to operate the bus in question without subjecting the passengers to harmful effects, for, in doing so, he was violating the high degree of care required of common carriers. In *Washington v. Spokane Street Railway Company*, 13 Wash. 9; 42 Pac. 628, the court held that it was the duty of a common carrier whose car was out of repair to give the passengers full notice of the condition and to give them the opportunity to decide whether or not they would continue as passengers. In the case at bar, the bus driver did not do this.

Contrary to appellant's assertions (App. Br. 59, 60) a standard of care was established by its own bus driver as well as plaintiff's expert, Mr. West. The jury could reasonably believe this standard was violated in view of the evidence.

We submit there was sufficient evidence to warrant the trial court's instruction on this issue.

CONCLUSION

It is submitted that after this whole record is considered that the action of the trial court, challenged by the appellant in its specification of errors, was not erroneous and that the judgment of the trial court should in all respects be affirmed.

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